Supreme Court, U.S.
FILED

961459 MAR 14 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

ERIC PEDEN and SHARON L. SMITH,
for themselves and all others similarly situated,

Petitioners,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.
One Kansas City Place
1200 Main, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

ERIC C. PEDEN*
SCHLEICHER LATZ, P.C.
800 W. 47th Street, Suite 418
Kansas City, Missouri 64112
(816) 756-0800

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92 pp

QUESTION PRESENTED

Is it permissible, under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, for the State of Kansas to systematically impose *higher state income tax rates* on unmarried individuals at all levels of taxable income than the rates imposed on married couples?

PARTIES

The caption contains the names of all the parties below.*

---

* Petitioners and their counsel were designated by the district court to represent a certified plaintiff class of thousands of unmarried Kansas taxpayers from 1988 through the present. *See infra* at 9-10. Petitioners were Appellees in the proceedings before the Kansas Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. Introduction 2

II. Kansas Tax Rate Disparity Is Unprecedented ... 4

III. Proceedings in District Court 7

A. The Petition 7

B. District Court Rules Kansas Tax Rates Unconstitutional 8

IV. Kansas Supreme Court Reverses Ruling on Unconstitutionality 10

REASONS FOR GRANTING THE WRIT 12

I. The *Peden* Decision Misapplies *FCC v. Beach* and Conflicts with Earlier Decisions of This Court 13

A. Rational Basis Review 13

B. Heightened Level of Scrutiny 20

II. The *Peden* Decision Is the First Ever to Authorize Unlimited Tax Discrimination Against Persons Based Solely on Their Marital Status, and This Court Should Grant Certiorari to Safeguard the Constitutional Liberties of Thousands of Individuals 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989) 15

Boddie v. Connecticut, 401 U.S. 371 (1971) 23

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 22

Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982) 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 15, 28

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 27

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) ..... *passim*

Heller v. Doe, 509 U.S. 312 (1993) 15

Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978) 17

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 15

Nordlinger v. Hahn, 505 U.S. 1 (1992) 14

Peden v. State of Kansas, 261 Kan. 239, 930 P.2d 1 (1996) ..... *passim*

Romer v. Evans, 517 U.S. ___, 116 S. Ct. 1620 (1996) 15, 24

U.S.D. 229 v. State of Kansas, 256 Kan. 232, 885 P.2d 1170 (1994) 17

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 20

Zablocki v. Redhail, 434 U.S. 374 (1978) 22, 23

Zobel v. Williams, 457 U.S. 55 (1982) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution:

Fourteenth Amendment ..... *passim*

Constitution of the State of Kansas:

Article 11, § 2 ..... 2, 7

STATUTES

United States:

26 U.S.C. § 1 (Supp. 1996) 4, 19, 25

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1341 27

Revenue Act of 1948, ch. 168, §§ 301-05, 62 Stat. 110 26

Kansas:

1988 Kan. Sess. Laws, Ch. 381 6

1989 Kan. Sess. Laws, Ch. 303 6

1992 Kan. Sess. Laws, Ch. 280 6

Kan. Stat. Ann. § 79-3201 16

Kan. Stat. Ann. § 79-32,110 ..... *passim*

Kan. Stat. Ann. § 79-32,115 18

Other States:

Ala. Code § 40-18-5 (1993) 25

Ariz. Rev. Stat. Ann. § 43-1011 (1996) 25

Ark. Code Ann. § 26-51-201 (Michie 1992) 25

TABLE OF AUTHORITIES – Continued

Page

Cal. Rev. and Tax. Code § 17041 (West 1997) 25

Colo. Rev. Stat. § 39-22-104 (1994) 25

Conn. Gen. Stat. Ann. § 12-700 (West 1996) 25

Del. Code Ann. tit. 30 § 1102 (1994) 25

D.C. Code Ann. § 47-1806.3 (1990) 25

Ga. Code Ann. § 48-7-20 (1995) 25

Haw. Rev. Stat. § 235-51 (Supp. 1992) 25

Idaho Code § 63-3024 (1996) 25

Ill. Ann. Stat. ch. 35, para. 5/201 (Smith-Hurd 1996) 25

Ind. Code Ann. § 6-2.1-2-3 (Burns 1995) 25

Iowa Code Ann. § 422.5 (West 1996) 25

Ky. Rev. Stat. Ann. § 141.020 (1991) 25

La. Rev. Stat. Ann. § 47:32 (West 1990) 25

Me. Rev. Stat. Ann. tit. 36, § 5111 (Supp. 1996) 25

Md. Code Ann., Tax-Gen. § 10-105 (1996) 25

Mass. Gen. Laws. Ann. ch. 62, §§ 2 & 4 (Supp. 1996) 25

Mich. Comp. Laws Ann. § 206.51 (Supp. 1996) 25

Minn. Stat. Ann. § 290.06 (Supp. 1997) 25

Miss. Code Ann. § 27-7-5 (1994) 25

Mont. Code Ann. § 15-30-103 (1995) 25

Neb. Rev. Stat. § 77-2715.02 (Supp. 1994) 25

TABLE OF AUTHORITIES – Continued

Page

N.J. Stat. Ann § 54:8A-6 (1986) 25

N.M. Stat. Ann. § 7-2-7 (Michie 1995) 25

N.Y. Tax Law § 601 (McKinney Supp. 1997) 25

N.C. Gen. Stat. § 105-134.2 (1995) 25

N.D. Cent. Code § 57-38-29 (1993) 25

Ohio Rev. Code Ann. § 5747.02 (Page Supp. 1996) 25

Okla. Stat. Ann. tit. 68, § 2355 (West Supp. 1997) 25

Or. Rev. Stat. § 316.037 (1995) 25

Pa. Cons. Stat. Ann. § 7302 (Supp. 1996) 25

R.I. Gen. Laws § 44-30-2 (Supp. 1996) 25

S.C. Code Ann. § 12-7-210 (Law. Coop Supp. 1996) 25

Tenn. Code Ann. § 67-2-102 (1994) 25

Utah Code Ann. § 59-10-104 (1996) 25

Vt. Stat. Ann. tit. 32 § 5822 (1994) 25

Va. Code Ann. § 58.1-320 (Michie 1991) 25

W. Va. Code § 11-21-4e (1995) 25

Wis. Stat. Ann. § 71.06 (West 1989 & Supp. 1996) 25

RULES

Rules of the Supreme Court:

Rule 10(c) 1

Rule 14.1(f) 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Boris I. Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389 (1975) 25, 26

Lawrence Zelenak, *Marriage and the Income Tax*, 67 So. Cal. L. Rev. 339 (1994) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Kansas.

OPINIONS BELOW

The reported opinion of the Kansas Supreme Court, *Peden v. State of Kansas*, 261 Kan. 239, 930 P.2d 1 (1996), reversing the Shawnee County District Court's ruling that the higher state income tax rates charged to unmarried persons in Kansas violate the Equal Protection Clause, is reproduced in Appendix A (1a-40a).

The unreported opinion of the Shawnee County District Court, ruling that the higher state income tax rates charged to unmarried persons in Kansas violate the Equal Protection Clause, is reproduced in Appendix B (41a-44a). The district court's Journal Entry is reproduced in Appendix C (45a-47a).

STATEMENT OF JURISDICTION

The opinion of the Kansas Supreme Court was filed on December 20, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rules of this Court, Rule 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1 provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Article 11, § 2 of the Kansas Constitution provides: "**Taxation of incomes.** The state shall have power to levy and collect taxes on incomes from whatever source derived, which taxes may be graduated and progressive."

Section 79-32,110 of the Kansas Statutes Annotated (containing the Kansas state income tax rates), as modified and amended from 1988 through the present, is set forth in pertinent part in Appendix D (48a-51a) in accordance with Rules of this Court, Rule 14.1(f).

STATEMENT OF THE CASE

This case involves an equal protection challenge to the disparity in tax rates charged to married and unmarried persons under the Kansas income tax statute, Kan. Stat. Ann. § 79-32,110. The Kansas law imposes one set of tax rates on married taxpayers filing joint returns and another set of less-favorable tax rates on all other taxpayers.

I. Introduction.

The State of Kansas presently charges unmarried taxpayers income tax rates that are more than **20% HIGHER**

than the rates charged to married taxpayers, at all levels of taxable income:

Married Individuals Filing Joint Returns

Over	*But Not Over*		*Tax*
$0	$30,000		**3.50%** of taxable income
$30,000	$60,000	$1,050 plus	**6.25%** of excess over $30,000
$60,000	–	$2,925 plus	**6.45%** of excess over $60,000

All Other Individuals

Over	*But Not Over*		*Tax*
$0	$20,000		**4.40%** of taxable income
$20,000	$30,000	$ 880 plus	**7.50%** of excess over $20,000
$30,000	–	$1,630 plus	**7.75%** of excess over $30,000

Kan. Stat. Ann. § 79-32,110(a) (1996 Supp.).

This dual-rate structure has the effect of creating a surtax on being single. All levels of taxable income earned by a married couple are taxed at lower statutory rates than the taxable income earned by an unmarried individual. Married taxpayers with $10,000, $100,000, $1,000,000 or $10,000,000 of taxable income will never be subject to a rate higher than 6.45%. Unmarried taxpayers will pay tax at the rates of 7.5% and 7.75% on all amounts of taxable income in excess of $20,000.

The Kansas Supreme Court upheld this blanket discrimination on the *sole basis* that the differences in tax rates are *rationally related to the state's interest in encouraging marriage*:

> It is rational to speculate that lower tax rates for married taxpayers will entice singles to marry and stay married in order to receive the benefit of the lower rates, even if there is no data to prove this speculation in reality. . . . It is true that the higher single tax rates never even out with the married rates, no matter how much money the married taxpayers earn. However, the benefits of marriage to society never cease, no matter how wealthy the married taxpayers become. Thus, the encouragement of taxpayers to marry and stay married, such as through lower tax rates for married taxpayers, should never cease either, no matter how wealthy the married taxpayers become.

(39a).

II. Kansas Tax Rate Disparity Is Unprecedented

The Kansas tax rate disparity and its justification are unprecedented. Neither the federal government nor any other state, at any time in history, has ever charged higher statutory tax rates to unmarried persons.[1] Exhaustive research has failed to disclose any other federal or

---

[1] For example, under the federal income tax law, the tax *rates* for both married and unmarried individuals are the same, and have always been the same with respect to the lowest and highest rates. 26 U.S.C. § 1 (Supp. 1996) (The current rates for both classes start at 15% and end at 39.6%). While there are different *brackets* of taxable income to which the rates apply

state income tax law ever crafted as a legislative tool to encourage marriage or penalize singlehood. Other tax classifications between married and single taxpayers, such as different deduction or exemption amounts or different tax brackets, logically arise because a married couple consists of two taxpayers. The two-versus-one distinction between married and single taxpayers does not explain an unlimited and systematic discrimination in rates at all levels of income.

The Kansas legislature first instigated the tax rate disparity in 1988, imposing rates of **4.05%** and **5.3%** on married taxpayers filing joint returns and rates of **4.8%** and **6.1%** on unmarried taxpayers. Kan. Stat. Ann. § 79,32,110(a) (L. 1988, ch. 381, § 2). For the 1989-1991 tax years, the state imposed rates of **3.65%** and **5.15%** on married taxpayers filing joint returns and rates of **4.5%** and **5.95%** on unmarried taxpayers. Kan. Stat. Ann. § 79,32,110(a) (1989). For 1992 to the present, the state has imposed rates of **3.5%**, **6.25%** and **6.45%** on married taxpayers filing joint returns and rates of **4.4%**, **7.5%** and **7.75%** on unmarried taxpayers. Kan. Stat. Ann. § 79-32,110(a) (1996 Supp.).

The unique surtax arises because every dollar of taxable income earned by a single person is subject to a higher marginal tax rate. The first dollar of taxable income earned by a single person is taxed at a higher statutory rate. Thereafter, the rate disparity continues on

---

because of income-splitting by married couples, 39.6% is the highest rate to which any individual may be subject under the federal tax system – whether married or unmarried. (16a).

unlimited amounts of taxable income, such that unmarried individuals are taxed at rates that exceed the highest rates ever charged to a married couple. The highest rate applicable to unmarried taxpayers in Kansas is now **20.16%** higher than the top rate that applies to unmarried taxpayers, up from **15.09%** in 1988 and **15.53%** in 1989-1991:

Year	Highest Married Rate	Singles' Rates Exceeding the Highest Married Rate	Rate Surtax
1988	5.30%	6.10% (above $27,500)	15.09%
1989-1991	5.15%	5.95% (above $27,500)	15.53%
1992-present	6.45%	7.50% (above $20,000)	24.00%
		7.75% (above $30,000)	20.16%

The Kansas legislature did not state a purpose for the new dual-rate structure and discriminatory surtax contained within the 1988, 1989 and 1992 bills. The official legislative preambles to the bills provide *no* evidence of an underlying social purpose of encouraging marriage, much less stigmatizing or penalizing single people. *See* 1988 Kan. Sess. Laws, Ch. 381 ("An Act relating to taxation measured by income; concerning the filing requirements, determination of income, standard and itemized deductions, personal exemptions and rates of liability of an individual; concerning the net operating loss deduction and apportionment of business income of corporation; imposing an alternative minimum tax upon certain corporations . . . "); 1989 Kan. Sess. Laws, Ch. 303 ("An Act providing tax relief for Kansas taxpayers . . . "); 1992 Kan. Sess. Laws, Ch. 280 ("An Act concerning school

districts; affecting the financing thereof and providing revenue therefor; relating to quality performance and accountability . . . ").

Respondents admitted later that the Kansas tax rate disparity was *not* created for the purpose of encouraging taxpayers to marry. Respondent Nancy Parrish, Secretary of Revenue, specifically stated in a written memorandum [reproduced in Appendix E (52a-54a)] that the disparity was instigated for the purpose of generating a fixed target of tax dollars from singles: "When changes were made to the income tax statutes in 1988, the state tried to retain the same proportional burden between married individuals filing jointly and single filers. This was accomplished through differential rates for married individuals filing jointly and all others." (53a); (R. at 525-526).[2]

III. Proceedings in District Court

A. The Petition.

On April 14, 1993, Petitioner Eric Peden filed this case in Shawnee County District Court as a class action on behalf of unmarried Kansas taxpayers. Peden challenged the constitutionality of the state income tax rates charged to unmarried taxpayers under Kan. Stat. Ann. § 79-32,110 from 1988 through the present. In his Petition, Peden alleged that the rates charged to unmarried taxpayers in excess of the highest married rate violate the Equal Protection Clause and Article 11, § 2 of the Kansas Constitution. (R. at 9 (¶ 12)). Peden sought the following

---

[2] References to the record herein are to the record before the Kansas Supreme Court.

relief with respect to the unconstitutional taxation: a declaratory judgment, an injunction, an accounting and refunds (together with interest), and class certification. (R. at 9-15 (¶¶ 13-17, 24-30, C)).

B. District Court Rules Kansas Tax Rates Unconstitutional.

On March 15, 1994, Peden filed a motion for summary judgment, requesting the district court to declare the rates charged to unmarried taxpayers in excess of the highest married rates unconstitutional under both the United States and Kansas Constitutions. (R. at 123-130). Peden urged that the tax rate disparity in Kan. Stat. Ann. § 79-32,110 violates equal protection because it does not rationally further any legitimate state interest. (R. at 134).

On April 25, 1994, Respondents filed a response to Peden's summary judgment motion and cross-moved for summary judgment in their own right. (R. at 151-166). Respondents argued that the following four reasons justified the discrimination in rates: (1) the legislature may have believed that married couples have more financial burdens than single individuals with the same amount of income; (2) the legislature may have intended to provide an incentive for individuals to marry to support the public policy of promoting marriage in Kansas; (3) the legislature may have believed that married individuals are less likely to relocate and will remain in the State of Kansas for a longer period of time; and (4) the legislature may have intended to provide an incentive for taxpayers to file joint returns for purposes of ease of administration. (R. at 158-161).

The district court rejected each of Respondents' arguments and entered summary judgment in favor of Peden on September 7, 1994. (41a-44a); (45a-47a). The district court ruled that there is "no rational justification" for the discriminatory higher rates of tax charged to unmarried Kansas taxpayers. (44a). The district court declared that the Kansas tax rate structure violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 11, § 2 of the Kansas Constitution. (43a-44a); (46a). In its ruling, the district court noted that "the weakness of the Defendant's attempt to rationalize this disparity is exhibited by the lengths to which the Defendant goes to postulate some reasonable explanation for the obvious discrimination." (43a). The district court also concluded "[t]hat the public policy of the State of Kansas promotes marriage through its tax structure is almost fanciful when analytically examined." *Id.*

The district court subsequently entered an order certifying the case as a class action and ruling that the court had jurisdiction to grant refund relief to all class members, pursuant to motions for reconsideration filed by Peden. (R. at 636-651) (August 21, 1995).[3] The class was defined to include "[a]ll unmarried persons subject to Kansas state income taxation, at a rate in excess of the highest rate charged to married individuals filing joint returns, for one or more of the tax years 1988 through the

---

[3] Subsequent to the district court's ruling on unconstitutionality of the Kansas tax rates, over 25,000 Kansas taxpayers filed administrative claims for refund with the Department of Revenue. Respondents' Reply Brief (Kansas Supreme Court) at 14. In addition, over 500,000 Kansas taxpayers file single tax returns on an annual basis. (R. at 519).

present." (R. at 650). Respondents thereafter filed an appeal directly with the Kansas Supreme Court. (R. at 658-659).

IV. Kansas Supreme Court Reverses Ruling On Unconstitutionality

In a published decision filed December 20, 1996, the Kansas Supreme Court reversed the district court's judgment and held that the discriminatory Kansas tax rate structure is not an unconstitutional violation of the Equal Protection Clause. (1a-40a). The state's high court ostensibly utilized rational basis review.[4] *First*, the Kansas Supreme Court determined that "it is clear that the encouragement of marriage is a valid state interest."[5]

---

[4] The sole "rational basis" adopted and relied on by the Kansas Supreme Court was that the Kansas tax rate disparity is rationally related to the state's interest of encouraging marriage. Respondents had argued four possible "rational bases" to justify the disparity: (1) the encouragement of marriage, (2) an alleviation of the increased financial burden placed on married taxpayers, (3) an alleviation of the "marriage penalty" under the federal income tax law, and (4) the encouragement of tax filers who can file one joint return to do so. (23a).

[5] In making this determination, the Kansas Supreme Court ignored the fundamental rights of Kansas taxpayers to be and remain single. It relied on language from Kansas divorce cases to conclude that "Kansas recognizes a public policy in fostering, protecting, and encouraging marriage." (31a). The Kansas Supreme Court also relied on specific Kansas statutes regarding *(i)* marriage ceremonies, *(ii)* privilege for confidential marriage communications, *(iii)* tort claims for loss of consortium of a spouse, and *(iv)* intestate succession rights of surviving spouses, as examples "which promote Kansas' public policy

(35a). *Second*, the Kansas Supreme Court concluded that the excess tax rates charged to unmarried taxpayers are "rationally related" to the state's interest of encouraging marriage because "[i]t is certainly a rational speculation to assume that imposing a lower tax rate on married taxpayers will entice singles to get married and encourage married couples to stay together." (36a).

The Kansas Supreme Court relied on language from *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) to find that "rational speculation" alone was sufficient to satisfy the rational basis test. (36a-37a). The court noted that no hard data was put forth, or required to be put forth, by Respondents to prove the speculation that Kansas' tax rates entice marriage. (37a). The Kansas Supreme Court found the proposition that Kansas' tax rates entice people to marry to be "rational speculation" because "[m]any tax benefits are based on the rationale that they will entice a taxpayer to behave in a certain way. . . . Thus, it is rational for the State to speculate that favorable tax treatment for married taxpayers in the form of lower rates will encourage single taxpayers to get married and stay married . . . " (36a-37a).

---

favoring marriage." (32a). Finally, the Kansas Supreme Court relied on, and took judicial notice of, 14 articles/studies on social matters not previously presented to the district court in accepting Respondents' contention that "society is better off when people are married." (34a-35a).

REASONS FOR GRANTING THE WRIT

The facts of this case lead to the inescapable conclusion that the protections of the Equal Protection Clause, as previously construed by this Court, have been violated. In an aberrant case of post-hoc social engineering, the Kansas Supreme Court has become the first court anywhere to authorize unlimited tax discrimination against persons based solely on their marital status. It has done so by misusing this Court's decision in *FCC v. Beach* to effectively nullify rational basis review and avoid heightened scrutiny. The Kansas high court ignores the admitted motivation of the legislature behind the tax rate disparity, and it disregards objective evidence that the Kansas tax rates have nothing to do with promoting the goodness of marriage. This case involves the impingement upon fundamental rights and liberties of thousands of persons in regard to their decisions whether to marry, stay married or remain single. These persons are presently stranded without any judicial forum to safeguard their constitutional rights, except this Court. And the unconstitutional taxation in Kansas will continue.

Without the intervention of this Court, equal protection for more than 500,000 unmarried persons who work or earn money in Kansas each year is nonexistent. Protection of an individual's personal rights and liberties under the Constitution and maintenance of meaningful judicial safeguards for such freedoms are of paramount public import for the entire United States. As the guardian of constitutional liberties, this Court should take the opportunity to correct the clear error below.

I. The *Peden* Decision Misapplies *FCC v. Beach* and Conflicts with Earlier Decisions of This Court.

A. Rational Basis Review.

In *FCC v. Beach*, this Court considered the constitutionality of an exemption from cable television regulation contained within the Cable Communications Policy Act of 1984. 508 U.S. at 307. The federal act exempted certain cable television facilities that serve one or more buildings under common ownership or management, but not facilities that serve separately owned and managed buildings. All nine Justices agreed that, under rational basis review, the regulatory distinction did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. The Court stated that a legislative classification must be upheld under the rational basis test "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. "Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' " *Id.* Justice Stevens concurred in the judgment but wrote separately, expressing a concern that the "conceivable set of facts" test could be "tantamount to no review at all" in certain cases. *Id.* at 323 (footnote 3).

Justice Stevens' concern has been borne out by the *Peden* decision. In *FCC v. Beach*, this Court stated that a legislature is not required to articulate its reasons for enacting a statute, and the absence of legislative facts to explain a statutory distinction has no significance in rational basis analysis:

> In other words, a legislative choice is not subject to courtroom fact-finding and may be based on

> *rational speculation* unsupported by evidence or empirical data.

Id. at 315 (emphasis added). The Kansas Supreme Court narrowly focused on this quoted language from *FCC v. Beach* to find that "rational speculation" alone justifies and explains the unique Kansas tax structure. (36a). The Kansas Supreme Court concluded that "[i]t is rational to speculate that lower tax rates for married taxpayers will entice singles to marry and stay married in order to receive the benefit of the lower rates, even if there is no data to prove this speculation in reality." (39a).

The Kansas Supreme Court has gleaned from *FCC v. Beach* that "rational speculation" brings rational basis inquiry to an end. Under the Kansas high court's interpretation, the rational basis test will be deemed satisfied if the court or the legislature can *rationally speculate* that one or two couples may be influenced to get married or stay married by virtue of the Kansas tax rate disparity. Such an interpretation of *FCC v. Beach* has rendered rational basis review meaningless. The Kansas high court has specifically ignored the key inquiry in rational basis review as required by this Court; i.e., whether there is a rational link between the Kansas tax rate disparity and promoting the goodness of marriage.

This Court has repeatedly held that rational basis review mandates an examination of the relationship of the *classification* to its *goal* to insure that the classification is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). As this Court recently reiterated:

> " . . . [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause."

Romer v. Evans, 517 U.S. ___, 116 S. Ct. 1620, 1627 (1996). In *Romer*, this Court held that if the "sheer breadth" of a classification "is so discontinuous with the reasons offered for it," the classification lacks a rational relationship to a legitimate state interest. *Id.* at 1627; *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) (" . . . even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").[6]

By focusing solely on "rational speculation," the *Peden* court's decision avoids any true examination of the link between the higher rates charged to unmarried taxpayers and the betterment of society through marriage. The Kansas Supreme Court simply concludes that it is "rational speculation" to assume that the rate disparity entices people to get married and stay married because "[m]any tax benefits are based on the rationale that they will entice a taxpayer to behave in a certain way." (36a). In support, the *Peden* court provides three examples: (i)

---

[6] Legislative schemes which distinguish between individuals based solely upon their marital status can, in fact, violate the Equal Protection Clause. *Eisenstadt v. Baird*, 405 U.S. 438, 446-56 (1972). Similarly, taxing schemes which classify taxpayers on irrational grounds have been struck under federal law. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982).

Congressional tax benefits to encourage charitable giving and charitable organizations; (ii) the home mortgage interest deduction to encourage home ownership; and (iii) provisions for tax-deferred IRAs and 401(k) plans to encourage saving. (36a-37a). None of these examples address the specific behavior at issue in this case – which is getting married and remaining married. Providing tax deductions for charitable giving, home mortgage interest payments or retirement plan contributions might be rational, but this does not demonstrate how the discriminatory Kansas rate structure rationally furthers marriage or the betterment of society.

Marriage is not simply a person's "behavior" that can be turned on and off by manipulating the provisions of the Kansas income tax code. Marriage is a social and religious contract involving the commitment of two persons at the deepest of personal levels. Importantly, it is not a "behavior" even available to many persons, including (i) single persons who have not yet found compatible mates, (ii) elderly widows unable to find husbands due to the longer life spans and the higher number of women, (iii) minor children lacking the capacity to marry, (iv) Catholic priests or divorced persons prevented from marrying because of religious convictions, and (v) persons unable or unlikely to marry due to physical or mental disabilities.

In reality, there is no link between the Kansas tax rate disparity and the behavior of marriage. The Kansas tax rate structure in Kan. Stat. Ann. § 79-32,110 is an income tax law. It is included as part of the "Kansas Income Tax Act." Kan. Stat. Ann. § 79-3201 *et seq.* The tax rate disparity was not passed as part of, or ever intended to be, a

marriage enrichment program, a social engineering experiment or a matchmaker program for singles. The scant legislative history confirms as much. *See supra* at 6-7. Interestingly, when other provisions of the 1992 income tax act were recently challenged in court on other grounds, the Kansas Supreme Court found that everything in the Act was related to public education – not marriage. *U.S.D. 229 v. State of Kansas*, 256 Kan. 232, 269, 885 P.2d 1170, 1194 (1994). Respondent Nancy Parrish even admits that the true purpose behind the rate discrimination against singles was to generate a fixed target of tax dollars from singles. *See supra* at 7. Conspicuously, the Kansas Supreme Court completely ignored any mention of Nancy Parrish's memorandum in its decision in *Peden*. At no point in the history of this litigation have the Respondents even argued that the Kansas tax rate disparity truly influences marital decisions. It is only the rational basis test, as now interpreted and applied by the Kansas Supreme Court, that breathes life into such a fiction.

There is simply no evidence that income tax rates have a significant effect on personal decisions whether to marry, divorce or remain single. *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 So. Cal. L. Rev. 339, 365 (1994) (" . . . widespread effects of the tax laws on the decisions to marry are unproven."); *Mapes v. United States*, 576 F.2d 896, 898 (Ct. Cl. 1978) ("Love and marriage defy economic analysis."). It is also a conclusion that common sense, logic and personal experience dictate. People understand the true reasons why they get married, why they get divorced or why they remain single. In response, the Kansas Supreme Court attempts

to deflect the issue by pointing to anecdotal evidence suggesting that the federal tax rates may affect marital decisions. (38a) (citing *Druker v. Commissioner*, 77 T.C. 867 (U.S. Tax Ct. 1981), *aff'd on this issue*, 697 F.2d 46 (2d Cir. 1982) (where a married couple adversely affected by the marriage penalty under the federal income tax law stated that they had "solved their problem" by divorcing but continuing to live together)). Such anecdotes do not transform the entire Kansas tax rate structure into a "rational" marriage scheme.

- Is it conceivable that the Kansas legislature believed that a couple's decision whether or not to marry would have been influenced by the Kansas income tax laws?

- Did the Kansas legislature conceivably believe that it was necessary, in effect, to pay people to get married?

- Is it believable that the Kansas legislature would want the decision to marry to be based on relative tax brackets?

Even an objective examination of the Kansas tax code highlights the absence of any link between the Kansas tax rate disparity and marriage. Kansas taxpayers are required by law to file state income tax returns under the same filing status that they utilize for federal filing purposes. Kan. Stat. Ann. § 79-32,115. Assuming that income tax laws are an important factor in making a matrimonial decision, it would be the *federal* income tax laws (and not the *Kansas* income tax laws) which would be the determining factor, since income taxes are significantly higher

at the federal level.[7] *See* 26 U.S.C. § 1 (federal income tax rates are presently 15%, 28%, 31%, 36% and 39.6%). Objective data also evidences the fact that encouragement of marriage was not a true legislative goal for the rate disparity. For the 1989-1991 tax years, an alternative tax rate schedule was available for those taxpayers who elected to take a deduction for federal income taxes paid. Under this lesser-used alternative schedule, there was no similar systematic discrimination in rates between married and single taxpayers. Kan. Stat. Ann. § 79-32,110(a) (1989).

Here, under the sanction of "rational speculation" from *FCC v. Beach*, the Kansas Supreme Court has stripped all substance from the Equal Protection Clause. The Kansas high court has successfully turned what was labeled as "fanciful" by the district court into "rational speculation" that now serves as the linchpin for the entire Kansas tax rate structure. In so doing, the Kansas Supreme Court misuses a regulatory/cable television case to place the unique Kansas tax rate disparity on par with general tax deductions. It is clear that the Kansas tax rate disparity was instigated as an easy, surreptitious way to raise money at the expense of single taxpayers, who are a minority. Yet, under the rational basis test as erroneously and illogically applied by the Kansas high court, the discriminatory Kansas tax code has now been rationalized as a social engineering scheme. Even under

---

[7] The Kansas Supreme Court responded by stating that, even so, "[i]t is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married." (38a).

deferential rational basis review, a court is not required to accept at face value assertions of legislative purposes when an examination of a legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. *See Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Unless this Court corrects the *Peden* decision, the unprecedented discrimination against unmarried taxpayers in Kansas and its mythical constitutional underpinnings will be allowed to continue.

B. Heightened Level of Scrutiny.

In *FCC v. Beach*, this Court reversed the judgment of the Court of Appeals by finding a rational basis for the challenged regulatory classification. The Court's decision noted that rational basis review was appropriate in areas of social and economic policy for a statutory classification that "neither proceeds along suspect lines nor infringes fundamental constitutional rights." 508 U.S. at 313. Because certiorari had been granted only on the rational basis question, this Court ultimately remanded the case to the Court of Appeals to consider the respondents' arguments regarding heightened scrutiny. *Id.* at 314 (footnote 6).

The Kansas Supreme Court in *Peden* similarly reversed the lower court's judgment by their *de novo* finding of a rational basis for the Kansas tax rate disparity. However, the Kansas high court did not remand on the issue of heightened scrutiny or even discuss the issue of heightened scrutiny. The court simply concluded that rational basis was the appropriate standard of review, based on the following:

> The rational basis standard . . . applies to laws which result in some economic inequality. The disparate tax rates applicable to single taxpayers and married taxpayers filing jointly create economic inequality. Thus, the tax rates in KITA are analyzed below under the rational basis standard.

(20a). The court's conclusion begs the question of whether the Kansas economic classification proceeds along suspect lines or infringes fundamental constitutional rights. For example, if Kansas imposed different rates of tax on men and women, people of a different race or people of different religions, heightened scrutiny would clearly apply.

By its decision in *Peden*, the Kansas Supreme Court now implicates fundamental constitutional rights and heightened scrutiny.[8] The *Peden* court rationalized the Kansas tax rate disparity solely as a status-based classification, specifically ruling that it is permissible to place a discriminatory burden on single persons for the sole purpose of encouraging marriage because society is better off when people are married. This Court has long recognized that freedom of personal choice in matters of marriage

---

[8] Petitioner Eric Peden sought, and obtained, summary judgment from the district court under rational basis review. However, Peden preserved the question of heightened scrutiny in his Petition, alleging that the Kansas tax classification between married and single taxpayers was "neither directly related to nor justified by significant differences between the classes of taxpayers." (R. at 9 (¶ 12)). The Kansas Supreme Court's decision on December 20, 1996 has now introduced the need for heightened scrutiny.

and family life is one of the fundamental liberties protected by the Constitution. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974) (Due Process Clause of the Fourteenth Amendment). This Court has also stated:

> While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education" . . .

Zablocki v. Redhail, 434 U.S. 374, 383 (1977) (internal citations omitted).

The discriminatory Kansas tax rate burden, as justified by the "rational speculation" now supplied by the Kansas Supreme Court, is a direct and substantial attempt to interfere with married and unmarried individuals' freedoms to make decisions regarding marriage and family life. This Court has held that, when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is closely tailored to effectuate an important state interest. *Id.* at 388. Heightened scrutiny should have been applied to the Kansas tax classification in connection with a legislative goal to better society through marriage and discriminatory tax rates – whether such goal is real or speculative. Here, the Kansas Supreme Court erroneously utilized "rational speculation" from *FCC v. Beach* to implicate fundamental constitutional rights and avoid heightened scrutiny, all in one step. Such an illogical application of

FCC v. Beach has sidestepped and jeopardized true equal protection review.

II. The *Peden* Decision Is the First Ever to Authorize Unlimited Tax Discrimination Against Persons Based Solely on Their Marital Status, and This Court Should Grant Certiorari to Safeguard the Constitutional Liberties of Thousands of Individuals.

The *Peden* case presents the unique and important federal question of whether the State of Kansas can maintain a surtax on unmarried individuals under its state income tax code consistent with the constitutional guaranty of equal protection. This Court has long recognized that the right to marry, the right to divorce and the right to remain single are basic fundamental human civil rights. *See Zablocki v. Redhail*, 434 U.S. at 384-86 (right to marry); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (right to divorce). Yet, under the unprecedented Kansas tax rate structure, thousands of persons who work or earn money in Kansas have been subject to blanket discrimination in tax rates based solely on their marital status.

It is rare to find a taxation scheme so blatantly discriminatory against a class of persons as the dual-rate Kansas income tax structure. The Kansas tax rate disparity discriminates across-the-board based on marital status alone. It ignores family status, age, income level and all other characteristics of a taxpayer. All married taxpayers subject to Kansas tax, regardless of whether they have children or other dependents, receive the benefit of the lower statutory rates. All unmarried taxpayers,

regardless of whether they have children or other dependents, are taxed at the higher statutory rates. Furthermore, this rate disparity applies to all, and unlimited, levels of taxable income. Married taxpayers with $10,000, $100,000, $1,000,000 or $10,000,000 of taxable income will never be subject to a rate higher than 6.45%. Unmarried taxpayers will pay tax at the rates of 7.5% and 7.75% on all amounts of taxable income in excess of $20,000.

It is well settled that "[c]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment." *Romer*, 116 S. Ct. at 1629 (quoting *Civil Rights Ca[illegible]* 109 U.S. 3, 24 (1883)). Yet, the *Peden* decision authorizes the State of Kansas to impose a systematic surtax on an entire class of taxpayers simply because they are not married. Income levels of respective taxpayers under the dual-rate Kansas tax structure are irrelevant, according to the Kansas Supreme Court:

> "[T]he benefits of marriage to society never cease, no matter how wealthy the married taxpayers become. Thus, the encouragement of taxpayers to marry and stay married, such as through lower tax rates for married taxpayers, should never cease either, no matter how wealthy the married taxpayers become."

(39a).

No equal protection case supports the unprecedented discrimination against singles levied by the State of Kansas since 1988. In fact, the Kansas income tax law conflicts with the income tax laws of the federal government and

all other states.[9] (15a). No other income tax law has ever been designed, utilized or explained as legislation to encourage marriage. Under the federal income tax law, the tax rates for all individuals are the same; and differences in tax liabilities between married couples and single persons on equal amounts of income have nothing to do with the enticement of marriage. *See* Boris I. Bittker, *Federal Income Taxation and the Family,* 27 Stan. L. Rev.

---

[9] Neither the federal government nor any other state in the nation charges excess income tax rates to unmarried taxpayers like Kansas. *See* 26 U.S.C. § 1; Ala. Code § 40-18-5 (1996); Ariz. Rev. Stat. Ann. § 43-1011 (1996); Ark. Code Ann. § 26-51-201 (Michie 1992); Cal. Rev. and Tax. Code § 17041 (West 1997); Colo. Rev. Stat. § 39-22-104 (1994); Conn. Gen. Stat. Ann. § 12-700 (West 1996); Del. Code Ann. tit. 30 § 1102 (1994); D.C. Code Ann. § 47-1806.3 (1990); Ga. Code Ann. § 48-7-20 (1995); Haw. Rev. Stat. § 235-51 (Supp. 1992); Idaho Code § 63-3024 (1996); Ill. Ann. Stat. ch. 35, para. 5/201 (Smith-Hurd 1996); Ind. Code Ann. § 6-2.1-2-3 (Burns 1995); Iowa Code Ann. § 422.5 (West 1996); Ky. Rev. Stat. Ann. § 141.020 (1991); La. Rev. Stat. Ann. § 47:32 (West 1990); Me. Rev. Stat. Ann. tit. 36, § 5111 (Supp. 1996); Md. Code Ann., Tax-Gen. § 10-105 (1996); Mass. Gen. Laws. Ann. ch. 62, §§ 2 & 4 (Supp. 1996); Mich. Comp. Laws Ann. § 206.51 (Supp. 1996); Minn. Stat. Ann. § 290.06 (Supp. 1997); Miss. Code Ann. § 27-7-5 (1994); Mont. Code Ann. § 15-30-103 (1995); Neb. Rev. Stat. § 77-2715.02 (Supp. 1994); N.J. Stat. Ann § 54:8A-6 (1986); N.M. Stat. Ann. § 7-2-7 (Michie 1995); N.Y. Tax Law § 601 (McKinney Supp. 1997); N.C. Gen. Stat. § 105-134.2 (1995); N.D. Cent. Code § 57-38-29 (1993); Ohio Rev. Code Ann. § 5747.02 (Page Supp. 1996); Okla. Stat. Ann. tit. 68, § 2355 (West Supp. 1997); Or. Rev. Stat. § 316.037 (1995); Pa. Cons. Stat. Ann. § 7302 (Supp. 1996); R.I. Gen. Laws § 44-30-2 (Supp. 1996); S.C. Code Ann. § 12-7-210 (Law. Coop Supp. 1996); Tenn. Code Ann. § 67-2-102 (1994); Utah Code Ann. § 59-10-104 (1996); Vt. Stat. Ann. tit. 32 § 5822 (1994); Va. Code Ann. § 58.1-320 (Michie 1991); W. Va. Code § 11-21-4e (1995); Wis. Stat. Ann. 71.06 (West 1989 & Supp. 1996).

1389 (1975). Married couples sometimes enjoy a lower overall tax liability under federal law only because they are allowed to split their income between themselves. Congress authorized income-splitting in 1948 for the sole purpose of achieving tax equity between married taxpayers in community property states and married taxpayers in non-community property states, not to encourage marriage. Revenue Act of 1948, ch. 168, §§ 301-05, 62 Stat. 110. At no point has the federal law ever imposed higher tax rates on single persons or ever systematically discriminated against singles in its tax structure, like Kansas. In fact, the federal law even has the effect of creating a "marriage penalty" on certain married couples who both earn income. Bittker, *supra*, at 1429.

Under the unprecedented Kansas tax structure, the highest rate applicable to unmarried taxpayers in Kansas is now **20.16%** higher than the top rate that applies to married taxpayers, up from **15.05%** in 1988 and **15.53%** in 1989-1991. If the *Peden* decision is left to stand, there is nothing to prevent the State of Kansas from widening the tax rate disparity even further. The disparity could also be extended to other types of taxes. For example, the State of Kansas could impose higher personal property tax rates on unmarried individuals. It could also charge higher real estate tax rates on the homes of single persons. It could impose higher sales tax rates on purchases made by unmarried individuals. It could charge higher highway tolls on unmarried drivers using state roads. All of these disparities would be permissible, according to the Kansas Supreme Court, because of the "rational speculation" that they may entice marriage.

Because *Peden* involves a constitutional challenge to a state tax law, Petitioners have no federal forum but this Court to ensure that their constitutional liberties are safeguarded.[10] By its decision in *Peden*, the Kansas Supreme Court has effectively erected a barrier that forecloses any further state review of the federal equal protection rights of thousands of past, present and future Kansas taxpayers. These individuals will continue to work and earn money in Kansas and be subject to "gross disparity and discrimination" in tax rates, as recognized by the district court (43a), based solely on their marital status. Unless this Court steps in to settle this issue at this time, the State of Kansas has a continuing license to violate the provisions of the Equal Protection Clause through its discriminatory tax code, all under the guise of enticing people to marry.

---

[10] *See* 28 U.S.C. § 1341 (the Tax Injunction Act prohibits federal courts from interfering with the collection of any state tax "where a plain, speedy and efficient remedy may be had in the courts of such State"); *see also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) (where this Court held that taxpayers are barred by the principle of comity from asserting federal civil rights actions for damages challenging the validity of state tax laws in federal courts: "Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.").

CONCLUSION

As stated by this Court, the Equal Protection Clause is specifically designed to protect individuals from arbitrary and unreasonable legislation that discriminates in favor of the majority, such as the Kansas tax rate disparity in the present case:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Eisenstadt v. Baird, 405 U.S. at 454 (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949)). Unmarried individuals subject to Kansas taxation should enjoy the same protections in the laws as married individuals. By correcting the *Peden* court's error, this Court will help ensure that "equal justice under law" extends to the entire United States.

For these reasons, Petitioners respectfully request that this Court issue a writ of certiorari to the Supreme Court of the State of Kansas.

Respectfully submitted,

ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.

ERIC C. PEDEN*
SCHLEICHER LATZ, P.C.

Counsel for Petitioners

**Counsel of Record*

March 13, 1997

APPENDIX A

No. 75,205

ERIC PEDEN and SHARON L. SMITH, for themselves and all others similarly situated, *Appellees*, v. STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas, *Appellants*.

SYLLABUS BY THE COURT

1. STATUTES – *Constitutionality – Equal Protection Concerns – Appellate Review.* Determining whether a statute violates equal protection is a question of law. When determining a question of law, this court may exercise an unlimited de novo standard of review.

2. SAME – *Constitutionality – Presumption of Constitutionality – Construction by Courts.* A statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute must clearly violate the constitution before it may be struck down. This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute.

3. SAME – *Constitutionality – Equal Protection Concerns – Application to Disparate Tax Rates for Single and Married Persons.* Equal protection is implicated when a statute treats "arguably indistinguishable" classes of people differently. Single and married taxpayers are arguably indistinguishable in a legal sense, and the Kansas Income Tax Act treats single

and married taxpayers differently in regard to the tax rates applicable to each group. Thus, the Kansas Income Tax Act implicates equal protection.

4. SAME – *Constitutionality – Reasonable Basis Test.* The rational basis standard (sometimes referred to as the reasonable basis test) applies to laws which result in some economic inequality. Under this standard, a law is constitutional, despite some unequal classification of citizens, if the classification bears a reasonable relationship to a valid legislative objective.

5. SAME – *Constitutionality – Reasonable Basis Test.* The reasonable basis test is violated only if the statutory classification rests on grounds wholly irrelevant to the achievement of the State's legitimate objective. The state legislature is presumed to have acted within its constitutional power, even if the statute results in some inequality. Under the reasonable basis test, a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

6. SAME – *Constitutionality – Reasonable Basis Test – Burden of Proof on Party Asserting Unconstitutionality.* A plaintiff asserting the unconstitutionality of a statute under the rational basis standard has the burden to negate every conceivable basis which might support the classification.

7. TAXATION – *Classification – Legislative Authority.* In taxation, even more than in other fields, legislatures possess the greatest freedom in classification.

8. STATUTES – *Constitutionality – Reasonable Basis Test – Challenge to Statutory Classification on Equal Protection Principles.* Under the reasonable basis test, it is unnecessary to ascertain the specific purpose the

Kansas Legislature espoused, if any, in establishing the challenged classification. Rather, if any state of facts reasonably may be conceived to justify the alleged statutory discrimination, the statute will not be set aside as a violation of equal protection.

9. SAME – *Constitutionality – Reasonable Basis Test – Court Review of Legislative Classifications.* Courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality.

10. SAME – *Constitutionality – Reasonable Basis Test – Application to Discriminatory Classifications.* Although the rational basis standard requires that the discriminatory classification (in this case, the tax rate disparity between single and married taxpayers) be rationally related to valid State interests or goals, the standard does not require that the classification be the perfect solution to achieve such goals.

11. MARRIAGE – *Public Policy.* Public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage married parties to live together, and to prevent separation.

12. LEGISLATURE – *Freedom of Legislature to Make Choices Based on Rational Speculation.* A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

Appeal from Shawnee district court; Matthew J. Dowd, judge. Opinion filed December 20, 1996. Reversed.

Timothy B. Dyk, of Jones, Day, Reavis & Pogue, of Washington, D.C., argued the cause, and *Gregory A. Castanias*, of the same firm, and *Richard Qxendale*, general counsel, *David A. Prager, III*, and *Frank Reeb*, of the Kansas Department of Revenue, were with him on the briefs for appellants.

Michael E. Waldeck, of Niewald, Waldeck & Brown, P.C., of Kansas City, Missouri, argued the cause, and *Angela K. Green*, *David T. Glynn*, and *Vincent F. O'Flaherty*, of the same firm, of Overland Park, and *Eric C. Peden* and *Steven J. Schleicher*, of Schleicher Latz, P.C., of Kansas City, Missouri, were with him on the brief for appellees.

The opinion of the court was delivered by

Abbott, J.: The plaintiff challenged the tax rate schedule found in the Kansas Income Tax Act (KITA), K.S.A. 79-3201 *et seq.*, to the extent that tax rates imposed on single taxpayers are higher than the highest tax rate imposed on married taxpayers filing jointly. The Shawnee County District Court found that such tax rates under KITA were an unconstitutional violation of equal protection. The trial court also ruled that it had subject matter jurisdiction to hear the plaintiff's claim for a tax refund, even though the plaintiff had not exhausted all of his administrative remedies to receive a refund. Finally, the trial court certified a plaintiff class of single taxpayers who were subject to tax rates higher than the highest tax rate imposed on married taxpayers filing jointly. The State appeals all three of these rulings to this court.

Plaintiff's narrow challenge is directed only to the Kansas tax rates applied to unmarried taxpayers which exceed the highest income tax rate charged to married

individuals filing under the status of "married filing joint." Stated in terms more understandable to the unmarried taxpayers of this state, this appeal does not involve any taxpayer having a *taxable* income of $20,000 or less, nor does it involve the first $20,000 of taxable income of any unmarried taxpayer having a taxable income in excess of $20,000 under the 1992-1996 tax rate schedules. (Prior to 1992, the tax rate schedules had different rates and tax brackets and had an overall smaller disparity between married and unmarried taxpayers.) Further, the largest current rate disparity at issue in this appeal between unmarried taxpayers and married taxpayers filing jointly is a 1.3% difference in tax rates. The trial judge only held part of KITA unconstitutional – that part which taxes an unmarried person's taxable income at a tax rate in excess of the highest income tax rate applicable to married taxpayers filing a joint return. Currently, the highest rate for a married person filing a joint return is 6.45%, while an unmarried taxpayer is subject to a 7.5% tax rate if the taxpayer earns more than $20,000 in taxable income and is subject to a 7.75% tax rate if the taxpayer earns more than $30,000 in taxable income. If we were to affirm the trial court's holding that KITA tax rates are unconstitutional in part, KITA's savings clauses (K.S.A. 79-3239 and K.S.A. 79-32,108) would leave the remainder of the act intact. Thus, a single taxpayer earning $20,000 or less in taxable income would continue to be taxed at a 4.4% rate, while a married taxpayer filing jointly who earns $30,000 or less would continue to be taxed at a lower rate of 3.5%.

A summary of the Kansas income tax system is helpful in analyzing this case. Under KITA, each taxpayer in

Kansas must pay a certain percentage of his or her taxable income in Kansas income tax. A taxpayer's taxable income is determined by calculating the taxpayer's Kansas adjusted gross income (using the federal adjusted gross income as a base) and subtracting Kansas deductions and personal exemptions from the gross income. The percentage of the taxpayer's taxable income that should be paid as income tax is equivalent to the tax rate applicable to the taxpayer. In Kansas, the tax rate applicable to each taxpayer is dependent upon the amount of taxable income the taxpayer earns and whether the taxpayer is married and filing jointly or filing a separate return as a single person.

The Kansas Legislature first created the tax rate disparity subject to challenge in this case in 1988. At that time, the Kansas Legislature made extensive changes to KITA by replacing the then existing eight-bracket tax rate schedule with a two-bracket tax rate schedule. This new 1988 tax rate schedule imposed higher rates on individual, single tax filers than the tax rates imposed on married taxpayers filing jointly. The 1988 tax rates (L. 1988, ch. 381, § 2) provided:

(1) Married individuals filing joint returns.

If the taxable income is:	The tax is:
Not over $35,000	4.5% [sic] of Kansas taxable income
Over $35,000	$1,418 plus 5.3% of excess over $35,000

(2) All other individuals.

If the taxable income is:	The tax is:
Not over $27,000	4.8% of Kansas taxable income
Over $27,500	$1,320 plus 6.1% of excess over $27,500

For the tax years 1989, 1990, and 1991, approximately the same disparity in tax rates applied, but lower tax rates were imposed overall (see K.S.A. 79-32,110[a]):

(1) Married individuals filing joint returns.

If the taxable income is:	The tax is:
Not over $35,000	3.65% of Kansas taxable income
Over $35,000	$1,278 plus 5.15% of excess over $35,000

(2) All other individuals.

If the taxable income is:	The tax is:
Not over $27,000	4.5% of Kansas taxable income
Over $27,500	$1,238 plus 5.95% of excess over $27,500

In 1992, the Kansas Legislature revised the tax rate schedule to create three different tax rates, rather than two, thereby widening the tax rate disparity between married taxpayers filing jointly and single taxpayers. The 1992 rate schedule remains unchanged and is used today. See K.S.A. 1995 Supp. 79-32,110(a). It provides:

(1) Married individuals filing joint returns.

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) All other individuals.

If the taxable income is:	The tax is:
Not over $20,000	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000	$1,630 plus 7.75% of excess over $30,000

On April 14, 1993, Peden filed a petition in the Shawnee County District Court against the State of Kansas, the Kansas Department of Revenue, the Secretary of Revenue of the State of Kansas, Nancy Parrish, and the Director of Taxation of the State of Kansas, Alisa Dotson. (All defendants are hereinafter referred to as the State.) In this action, Peden sought four things. First, Peden requested that the trial court certify a plaintiff class consisting of all single taxpayers in Kansas who paid taxes under the single tax rates which were higher than the highest tax rate imposed on married taxpayers filing jointly. Second, Peden requested that the trial court declare the single tax rates found in K.S.A. 79-32,110(a) unconstitutional as a violation of equal protection under Article 11, § 2 of the Kansas Constitution and under the 14th Amendment to

the United States Constitution to the extent that the single tax rates were higher than the highest tax rate imposed on married taxpayers filing jointly. Third, Peden asked the trial court to enjoin the State from collecting taxes from single taxpayers at an unconstitutional rate in excess of the highest rate imposed on married taxpayers filing jointly. Fourth and finally, Peden sought an accounting of all improperly collected income taxes based on the discriminatory tax rates from 1988 to the present and a refund of such taxes paid with interest.

Peden filed a motion specifically asking the trial court to certify this case as a class action and find that Peden was a proper class representative. The trial court ruled that there was no compelling need for class certification in this case because there was "nothing that [could] be accomplished by class certification that [could not] be handled by ordinary litigation procedures." The court denied Peden's motion and refused to certify a plaintiff class.

On June 21, 1993, the State filed a motion to dismiss Peden's tax refund claim for lack of subject matter jurisdiction because Peden had not yet exhausted all of his administrative remedies. On January 5, 1994, the trial court ruled on this motion. The court found that Peden had not yet exhausted his administrative remedies in regard to the refund claim; thus, the court held that it did not have subject matter jurisdiction to hear the refund claim. The court granted the State's motion and dismissed the refund claim for lack of subject matter jurisdiction. As such, only two claims remained in Peden's petition – (1) an individual request that the court declare the disparate tax rates an unconstitutional violation of

equal protection and (2) an individual request that the court enjoin the State from collecting future income taxes from Peden at a rate in excess of the highest rate imposed on married taxpayers filing jointly.

Based on these two claims, Peden filed a motion for summary judgment on March 15, 1994. The State also filed a motion for summary judgment on April 25, 1994. In analyzing the constitutionality of the tax rates, the trial court applied the rational basis test – asking whether there was a valid legislative purpose for KITA's different treatment of similarly situated taxpayers and whether the disparate tax rates were rationally related to this valid legislative purpose. In applying this test, the trial court stated:

> "There has been no rational basis for the [tax rate] distinction articulated by the Kansas Legislature, the Kansas Courts, or the executive agencies administering the Kansas tax law. In the Court's view the weakness of the Defendant's attempt to rationalize this disparity is exhibited by the lengths to which the Defendant goes to postulate some reasonable explanation for the obvious discrimination. Even recognizing that the Defendant State is allowed a great deal of latitude, the Court finds no rational basis for the discrimination. The fact that supposedly married couples have a greater economic burden is highly speculative and subject to a great deal of question and uncertainty. That the public policy of the State of Kansas promotes marriage through its tax structure is almost fanciful when analytically examined. The same can be said of the proposition that married individuals are less

> likely to relocate and will remain a stable economic unit for the State for longer periods of time. This leaves 'ease of administration' and again this Court finds that to be speculative and conjectural. None of the reasons, therefore, advanced by the State would seem to justify the gross disparity and discrimination that exists in the tax rate structure between single individuals and married individuals."

Based on this analysis, the trial court found the tax rates imposed on singles which were higher than the highest tax rate imposed on married taxpayers filing jointly were an unconstitutional violation of equal protection under the United States and Kansas Constitutions. The trial court granted Peden's motion for summary judgment for declaratory relief. The court held that injunctive relief would be unnecessary and therefore inappropriate.

On November 7, 1994, the State timely filed a notice of appeal to the Kansas Supreme Court, challenging the trial court's ruling that the tax rate schedule in KITA was unconstitutional in part. However, after the trial court filed its journal entry, Peden timely filed post-judgment motions on November 14, 1994, asking the trial court, *inter alia*, to reconsider its prior ruling which dismissed the tax refund claim for lack of subject matter jurisdiction and to reconsider its prior ruling which refused to certify a plaintiff class of single taxpayers.

The trial court declined to rule on Peden's post-judgment motions until after the State's appeal on the constitutionality of the tax rates had been decided. Peden filed a motion to this court, asking it to dismiss the State's

appeal. Finding that the trial court had not yet ruled on Peden's post-judgment motions, this court held that State's appeal was premature and dismissed the State's appeal.

On August 22, 1995, the trial court entered a memorandum decision and order regarding Peden's post-judgment motions. In regard to the refund issue, the trial court found that Peden sought relief from unconstitutional tax rates. Since an administrative agency cannot determine the constitutionality of a statute, the court held that no purpose would have been served by requiring Peden to exhaust his administrative remedies. The court ruled that the exhaustion doctrine should not apply in this case. As such, the court found that Peden's apparent lack of exhaustion of administrative remedies should not prevent the court from exercising subject matter jurisdiction over the refund claim. Thus, the court reconsidered its prior ruling, which dismissed the refund claim for lack of subject matter jurisdiction, and held that it could and would exercise jurisdiction over Peden's refund claim. Next, the court reconsidered its ruling in which it refused to certify a plaintiff class of single taxpayers. The court found that all the requirements needed to certify a class under K.S.A. 60-223(a) and (b)(3) were met. The court certified a plaintiff class and found Peden to be a proper class representative. The court defined the class as follows:

> "All unmarried persons subject to Kansas state income taxation, at a rate in excess of the highest rate charged to married individuals filing joint returns, for one or more of the tax years 1988 through the present."

Thus, on August 22, 1995, the court granted Peden's motions for reconsideration of subject matter jurisdiction over the refund claim and for reconsideration of class certification. Upon certification of the class, Peden filed a motion to certify Sharon L. Smith as a plaintiff and as another class representative. Apparently, the trial court granted this motion, although the record before us does not so show.

On September 20, 1995, the State filed a timely notice of appeal with this court, challenging these three rulings – the trial court's holding that the tax rates under KITA are an unconstitutional violation of equal protection to the extent that single taxpayers are subject to tax rates which are higher than the highest tax rate imposed on married taxpayers filing jointly; the trial court's ruling that it had subject matter jurisdiction to decide the tax refund claim; and the trial court's certification of the plaintiff class.

Since the trial court ruled that part of the Kansas tax rate schedule was unconstitutional, approximately 5,000 single taxpayers have filed claims with the Director of Taxation requesting tax refunds. All such requests for hearings are being held in abeyance by an administrative law judge pending resolution of this case.

The legislative history behind the rate disparity is slim to none. In a few of the committee meetings in 1988, when the rate disparity was first promulgated, and in 1992, when the rate disparity was widened, a few legislators expressed concern about the fact that single taxpayers were being taxed at higher rates than married

taxpayers filing jointly. However, no rationale or explanation for such disparity was ever provided. The legislature passed KITA without any further discussion about the tax rate disparity being recorded. See Minutes of the Senate Committee on Assessment and Taxation, February 3, 1988; February 19, 1988; March 31, 1992; Minutes of the House Committee on Taxation, March 6, 1992.

In its brief, the State argues that the federal income tax system taxes single taxpayers and married taxpayers filing jointly differently, as Kansas does. The State points out that this unequal treatment of taxpayers has not been found to be a constitutional violation of equal protection. *Druker v. C.I.R.*, 697 F.2d 46 (2d Cir. 1982), *cert. denied* 461 U.S. 957 (1983) (upholding marriage penalty); *Mapes v. United States*, 576 F.2d 896 (Cl. Ct.), *cert. denied* 439 U.S. 1046 (1978) (upholding marriage penalty); *Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556 (1972), *aff'd* 474 F.2d 1399 (2d Cir.), *cert. denied* 414 U.S. 831 (1973) (upholding single penalty). Thus, the State asserts that the similar tax rate disparity in Kansas does not violate equal protection, either.

Peden acknowledges that the federal income tax system does treat single taxpayers differently from married taxpayers filing jointly and that such differential treatment has been found to be constitutional. However, Peden asserts that the manner in which the federal tax code treats single and married taxpayers differently is not the same manner in which Kansas tax code treats single and married taxpayers differently. Thus, Peden reasons that just because the federal tax system is constitutional, this does not mean that the state tax system is constitutional. Peden contends that the two systems discriminate

between single and married taxpayers in different ways and for different reasons. In fact, Peden argues that the federal tax code has never charged single taxpayers a higher income tax *rate* than the highest rate applicable to married taxpayers filing jointly. According to Peden and our research on the issue, Kansas is the only state in the nation that has ever imposed higher tax *rates* on single taxpayers than the highest rate imposed on married taxpayers filing jointly. See Minutes of Senate Committee on Assessment and Taxation, February 19, 1988.

Peden then goes on to explain how the federal income tax system treats single and married taxpayers differently and how this system differs from the Kansas income tax system. As Peden explains, the federal income tax system treats married and single taxpayers differently by setting up different tax *brackets*, not rates, for married taxpayers and single taxpayers. Peden gives the following example of the 1995 federal income tax brackets:

Rate	Single Individuals Bracket	Married Filing Joint Bracket
15%	Under $23,350	Under $39,000
28%	$23,350-56,550	$39,000-94,250
31%	$56,550-117,950	$94,250-143,600
36%	$117,950-256,500	$143,600-256,500
39.6%	Over $256,500	Over $256,500

1995 Form 1040 Instructions (Department of the Treasury), p. 53. (The 1995 federal income tax schedule also provided brackets for married taxpayers filing separately and heads of household. These are not applicable here.)

Under these brackets, different rates may apply to taxpayers who earn the same amount of taxable income, depending upon whether the taxpayer files a separate return as a single taxpayer or files a joint return as a married taxpayer. A single taxpayer with $25,000 in taxable income is taxed at the 28% rate, while married taxpayers filing jointly with $25,000 in taxable income are taxed at a lower rate of 15%. However, as Peden points out, once married taxpayers filing jointly and single taxpayers earn a certain amount of taxable income, the tax rates even out. For instance, once a single taxpayer earns $117,950 in taxable income, the taxpayer will be taxed at a 36% rate, and once married taxpayers filing jointly earn $143,600 in taxable income, they also are taxed at a 36% rate. Once single taxpayers or married taxpayers filing jointly earn $256,500 in taxable income, both types of taxpayers enter a new bracket at this same income level and are taxed at the same rate – 39.6%. Both types of taxpayers will continue to be taxed at this same rate no matter how much more money they earn. However, in 1993, only about .9% of all federal taxpayers fell into the 39.6% tax bracket and were taxed equally regardless of their marital status. Internal Revenue Service, Statistics of Income-1993; Individual Income Tax Returns.

Thus, under the federal law, tax *rates* for both married taxpayers filing jointly and single taxpayers are the same, and have always been the same, with respect to the lowest and highest rates. 26 U.S.C. § 1 (1994). (The current rates for both types of taxpayers start at 15% and end at 39.6%.) While there are different brackets of taxable income to which the same rates apply, 39.6% is the highest rate to which any individual may be subject under the

federal tax system – whether married or unmarried. This is not the case under the Kansas income tax system, which applies different rates to approximately the same amount of income. Under the Kansas system, the top rates never even out, no matter how much money the married taxpayers filing jointly earn. The single taxpayer will always be taxed at a higher rate. In 1995, if a single taxpayer earned $30,001 in taxable income, he or she was taxed at a 7.75% rate, while if married taxpayers filing jointly earned $120,000 in taxable income (four times the single taxpayer), they were still taxed at the lower rate of 6.45% and always would be.

Thus, just because the federal tax system, which treats single and married taxpayers differently, is constitutional, Peden contends that this is not the case with the Kansas tax system and its treatment of single and married taxpayers. According to Peden, the Kansas tax system distinguishes between single and married taxpayers in a manner which is different from how the federal tax system distinguishes between single and married taxpayers. Further, Peden points out that the Kansas tax system does not have the same legislative history and rationale as the federal tax system. The federal tax system has a clear rationale, enumerated in the legislative history, which clarifies that the federal tax brackets treat single and married taxpayers differently in order to create geographic equality among married taxpayers in community property states and non-community property states. The Kansas tax system has no such rationale or legislative history. Thus, Peden asks this court to evaluate the constitutionality of the Kansas tax rates without regard to the constitutionality of the federal tax system.

Determining whether a statute unconstitutionally violates equal protection is a question of law. When determining a question of law, this court may exercise an unlimited de novo standard of review. See *Dickerson v. Kansas Dept. of Revenue*, 253 Kan. 843, 844, 863 P.2d 364 (1993); *State v. Nelson*, 249 Kan. 689, 692, 882 P.2d 53 (1991). This court is not bound by the decision of the trial court. *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 668, 722 P.2d 1093 (1986).

"[A] statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute must clearly violate the constitution before it may be struck down." *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243, 834 P.2d 368 (1992); see *State v. Scherzer*, 254 Kan. 926, Syl. ¶ 6, 869 P.2d 729 (1994). "This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute." *State v. Durrant*, 244 Kan. 522, 534, 769 P.2d 1174, *cert. denied* 492 U.S. 923 (1989).

A legislative act may not always be viewed by this court as fair or what we think should have been done, but that does not make the act unconstitutional. In *Morton Salt Co. v. City of South Hutchinson*, 159 F.2d 897, 900 (10th Cir. 1947), the 10th Circuit Court of Appeals commented:

> "It is not the judicial province to correct every abuse of legislative taxing power. In the words of Mr. Chief Justice Marshall, 'The interest, wisdom, and justice of the representative

> body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally.' *Providence Bank v. Billings*, 29 U.S. 514, 561, 7 L. Ed. 939; *Dane v. Jackson*, [256 U.S. 589, 65 L. Ed. 1107, 41 S. Ct. 566]; *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 21 S. Ct. 625, 45 L. Ed. 879; Cooley, Sec. 67."

For this appeal, the relevant principle of equal protection is embodied in § 1 of the Kansas Constitution Bill of Rights. This section provides:

> "**§ 1. Equal Rights**. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

The equal protection provision of the United States Constitution is found in the 14th Amendment, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The trial court found that KITA classifies single taxpayers differently than it classifies married taxpayers filing jointly and applies a higher tax rate on singles than the highest tax rate imposed on married taxpayers filing

jointly. According to the trial court, KITA creates a disparity between two classes of citizens, single taxpayers and married taxpayers filing jointly, thereby violating the equal protection rights of single taxpayers.

Equal protection is implicated when a statute treats "arguably indistinguishable" classes of people differently. *Smith v. Printup*, 254 Kan. 315, 321, 866 P.2d 985 (1993). Single taxpayers and married taxpayers are arguably indistinguishable in a legal sense. Neither party argues otherwise. Since KITA treats these two arguably indistinguishable groups differently in regard to the tax rates applicable to each group, KITA implicates equal protection.

Since KITA tax rates implicate equal protection, the court must determine which standard to use in evaluating the statute. The rational basis standard (sometimes referred to as the reasonable basis test) applies to laws which result in some economic inequality. The disparate tax rates applicable to single taxpayers and married taxpayers filing jointly create economic inequality. Thus, the tax rates in KITA are analyzed below under the rational basis standard. Under this standard, a law is constitutional, despite some unequal classification of citizens, if the "classification bears some reasonable relationship to a valid legislative objective." *Farley v. Engelken*, 241 Kan. 663, Syl. ¶ 3, 740 P.2d 1058 (1987). *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989), explains the "reasonable basis" test as follows:

> "The 'reasonable basis' test is violated only if the statutory classification rests on grounds wholly irrelevant to the achievement of the State's legitimate objective. The state legislature

> is presumed to have acted within its constitutional power, even if the statute results in some inequality. Under the reasonable basis test, a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Thus, under the rational basis standard, if the State can show that the different treatment between single taxpayers and married taxpayers filing jointly is rationally related to a valid legislative interest, then the single tax rates under KITA, which are higher than the highest tax rate imposed on married taxpayers filing jointly, do not violate equal protection. See *Leiker*, 245 Kan. at 364; *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 620, 576 P.2d 221 (1978). While both parties agree that the rational basis standard should be utilized in analyzing KITA, the parties disagree over the manner in which the standard should be used.

Relying on the presumption that statutes are constitutional, the State contends that KITA should be upheld unless the tax rate disparity is so arbitrary and irrational that it lacks any conceivable rational basis. Thus, the State points out that it only needs to offer "any state of facts [which] reasonably may be conceived to justify" the tax rate disparity in order to prevail. *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). On the other hand, Peden can only prevail under the rational basis standard, according to the State, if he can prove that no possible state of facts supports a rational basis for the classification. As the State points out, a plaintiff asserting the unconstitutionality of a statute under the rational

basis standard "ha[s] the burden 'to negative every conceivable basis which might support [the classification].' " *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); *Madden v. Kentucky*, 309 U.S. 83, 88, 84 L. Ed. 590, 60 S. Ct. 406 (1940). Further, the State asserts, and we agree, that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden*, 309 U.S. at 88.

The State acknowledges the absence of legislative history concerning the disparate tax rates. However, the State contends that this is irrelevant. According to the State, the legislature is not required to provide legislative history explaining the reasons behind a statute, and even if the legislature does provide such legislative history, the rational basis inquiry is not limited to those stated reasons. The State points to *Bair v. Peck*, 248 Kan. 824, 834, 811 P.2d 1176 (1991), in which this court stated: " 'Under the reasonable basis test, it is unnecessary to ascertain the specific purpose the Kansas Legislature espoused, *if any*, in establishing the challenged classification. Rather, if any state of facts reasonably may be conceived to justify the alleged statutory discrimination, the statute will not be set aside as a violation of equal protection.' " (Quoting *McGowan*, 366 U.S. at 426.) (Emphasis added.)

Thus, under the rational basis standard, the State asserts that all it is required to do to withstand an equal protection challenge is show "that a [valid] purpose may *conceivably* or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker" in promulgating the tax classifications. *Nordlinger v. Hahn*, 505 U.S. 1, 15, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992). (Emphasis added.) The State points out that because a

legislature is not required to articulate reasons for enacting a statute, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications, Inc.*, 508 U.S. at 315.

Under this standard, the State argues it can *conceive* of four valid state interests which rationally justify the disparate tax rate classifications. These state interests are: the encouragement of marriage, an alleviation of the increased financial burdens associated with marriage, an alleviation of the "marriage penalty" under the federal income tax law, and the encouragement of taxpayers who can file one joint return to do so.

Peden takes issue with the State's lenient interpretation of the rational basis standard and with the State's conceived justifications for the tax rate disparity. First, Peden asserts that the rational basis standard " 'is not a toothless one' " as stated in *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 775, 830 P.2d 41 (1992) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185, 50 L. Ed. 2d 308, 97 S. Ct. 431 (1976). "[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Peden then cites to several tax schemes which have classified taxpayers on baseless and irrational grounds and have been struck down under Kansas and federal constitutional law. *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 102 L. Ed. 2d 688, 109 S. Ct. 633 (1989) (real property tax assessment rates, based on recent purchase prices which were 8 to 35 times those applied to comparable neighboring properties, were held to violate equal

protection); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 84 L. Ed. 2d 751, 105 S. Ct. 1676, *reh. denied* 471 U.S. 1120 (1985) (state statute taxing out-of-state insurance companies at a higher rate than domestic insurance companies held not to have legitimate state purpose, thereby violating the equal protection clause); *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982) (Alaska statute distributing income derived from state's natural resources to state's citizens in varying amounts, based on the length of each citizen's residency, held to violate equal protection clause); and *Hartman v. State Commission of Revenue and Taxation*, 164 Kan. 67, 187 P.2d 939 (1947) (An income tax statute which imposed a different tax rate upon gains from the disposal of stock, depending upon whether the stockholder sold the stock or had his other share of the corporate assets distributed to him or her upon liquidation of the corporation, was found to violate equal protection because the different tax rates were arbitrary classifications that had no reasonable relation to the subject matter.).

Peden also takes issue with the purported justifications the State contends rationally support the different tax rates. According to Peden, just because the State has articulated some possible basis for the Kansas tax rate disparities, this does not mean that KITA automatically becomes constitutional. Peden contends that KITA is unconstitutional and does not survive an equal protection challenge because there is not an adequate nexus or "fit" between the disparate tax rates and any valid legislative objective the State is trying to achieve through the rates. As an example of this nexus problem, Peden cites to

Romer v. Evans, 517 U.S. ___, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996).

In *Romer*, the plaintiff challenged a Colorado state constitutional amendment, which effectively repealed the state and local provisions that barred discrimination on the basis of sexual orientation, as a violation of equal protection under a rational basis standard. The State offered two legislative interests as rationally justifying the constitutional amendment – (1) respecting other citizens' freedom to associate, such as employers or landlords who have personal or religious objections to homosexuality, and (2) conserving resources to fight discrimination against other groups. The Court found that there was not a close enough nexus between the amendment and the purported valid state interests justifying the amendment. Thus, the Court held that the amendment violated equal protection under the rational basis standard. In so holding, the court stated:

> "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . . ' *Civil Rights Cases*, 109 US, at 24, 27 L Ed 835, 3 S Ct 18." 134 L. Ed. 2d at 868.

Peden argues that this same lack of nexus exists between KITA and the purported valid state interests which the State contend rationally justify KITA.

According to Peden, this lack of nexus between the tax rates and the purported state interests exists because the tax rate disparity applies to all levels of taxable income. For instance, married taxpayers with $100,000, $1,000,000 or $10,000,000 of taxable income will never be subject to a tax rate higher than 6.45%, while single taxpayers are subject to a tax rate of 7.5% for all amounts of taxable income in excess of $20,000 and a tax rate of 7.75% for all amounts of taxable income in excess of $30,000. Peden asserts that at some level of taxable income for married taxpayers, the differential in rates makes no sense and cannot be said to rationally further any legislative objective.

Peden contends that the tax rate disparity is not rationally related to and does not have a nexus with any of the four purported state interests because the tax rate disparity is not drawn with any precision. For instance, the disparate tax rate schedule does not provide lower rates to taxpayers who actually need the benefit of the state interest the rates are meant to foster or impose a higher rate on those taxpayers who do not need such benefits. According to Peden, "There must be some difference in character, condition, or situation, to justify distinction . . . ; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert." *Henry v. Bauder*, 213 Kan. 751, 753, 518 P.2d 362 (1974). As such, Peden asserts that the nexus or rational relation between the disparate tax rates and any purported legislative interests meant to

be achieved through the rates is nonexistent and cannot support the tax rates under an equal protection challenge.

The State freely admits that not all married couples may suffer increased economic burdens as a married couple, or suffer a marriage penalty under the federal tax law, or be encouraged to get married and file a joint tax return due to lower tax rates for married taxpayers filing jointly. As such, the State concedes that the lower tax rates for all married couples are overinclusive because not all married couples need the benefit of the legislative interests which the tax rates are intended to attain. Further, the State acknowledges that the tax rates may be underinclusive because single taxpayers might experience more economic burdens than some married taxpayers do, but single taxpayers do not receive a lower tax rate to relieve those burdens as married taxpayers do. Thus, the State admits that there is not a perfect nexus between lower tax rates for married taxpayers and the interests the tax rates are intended to achieve. Nevertheless, the State argues that under the rational basis standard, a close fit or mathematical perfection between a legislative goal and the means chosen to further that goal is not required. See *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). The State points to *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70, 57 L. Ed 730, 33 S. Ct. 441 (1913), which provides:

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice

> may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment. . . . "

See also *Heller*, 509 U.S. at 321, which states:

> "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' [Citations omitted.]"

Thus, despite the inexact nexus or fit between lower tax rates for married taxpayers and the legislative objectives the rates are supposed to attain, the State contends that the tax rates do not violate equal protection. The State asserts that it has done what is necessary to defend against an equal protection challenge – it has raised a state of facts reasonably conceived to justify the tax rate disparity. In fact, the State claims it has raised four conceivable state of facts or valid state interests which rationally (not perfectly) justify the tax rates. Thus, the State asserts that it has done enough and Peden's extreme critique of the nexus or relationship between the rates and the interests they are intended to achieve is unnecessary under a rational basis standard, especially because the legislature possesses the greatest freedom of classification in the area of taxation. See *Madden*, 309 U.S. at 87-88.

We agree with the State. The rational basis standard is a very lenient standard. All the court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification. *Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556, 558 (1972), *aff'd* 474 F.2d 1399 (2d Cir.), *cert. denied* 414 U.S. 831 (1973). "Relevance is the only relationship required between the classification and the objective." *Stephenson*, 250 Kan. at 774. See also *Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 129, 631 P.2d 222 (1981) (stating that a classification which may result in some inequality only violates equal protection if the classification is "irrelevant" to the goals the State intended to achieve through passage of the statute). A classification is "relevant" to its intended goal if it is rationally related to the legitimate legislative purpose behind the statute. *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1018, 850 P.2d 773 (1993). However, a statute cannot classify persons into groups based on a criteria which is "wholly unrelated" to the goal of the statute. *Henry*, 213 Kan. at 753-54. A classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Thompson*, 252 Kan. at 1018 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 [1920]).

Although the rational basis standard requires that the discriminatory classification (the tax rate disparity between single and married taxpayers) be rationally related to valid state interests or goals, the standard does not require that the classification be the perfect solution

to achieve such goals. See *Thompson*, 252 Kan. at 1021 (When the legislature must draw a line and " 'there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless [the court] can say that it was very wide of any reasonable mark.' "); *Liggett*, 223 Kan. at 619 ("Establishment of classifications with mathematical precision is not required."). In trying to achieve certain goals, a legislature is affected by several factors which may prevent it from reaching the perfect solution. For instance, the tax rate classifications which may have been the perfect tax rate schedule to exactly meet all of the State's interests without any overinclusion or underinclusion may also have been impossible for the legislature to formulate and too difficult for the taxpayers to understand. Thus, a tax rate schedule which generally imposes lower tax rates on all married taxpayers filing jointly may achieve the State's interests in a more realistic way even though it results in some overinclusion or underinclusion. *Druker v. C.I.R.*, 697 F.2d 46, 50 (2d Cir. 1982) ("In the area of family taxation every legislative disposition is 'virtually fated to be both overinclusive and underinclusive when judged from one perspective or another.' "), *cert. denied* 461 U.S. 957 (1983). Compromise legislation, which is not made with mathematical perfection and results in some inequality, does not violate equal protection as long as the tax rate is rationally (not perfectly) related to the State's valid interests.

The State has conceived four interests which it believes are legitimate and which it believes the disparate tax rates are rationally related to, even though a perfect nexus does not exist between the tax rates and the goals

they are intended to achieve. As previously mentioned, these interests are: the encouragement of marriage, an alleviation of the increased financial burden placed on married taxpayers, an alleviation of the "marriage penalty" under the federal income tax law, and the encouragement of tax filers who can file one joint return to do so.

Under a rational basis standard, it is irrelevant whether these interests were enunciated in the legislative history of KITA or whether any of these interests actually motivated the legislature to pass the disparate tax rates. All that is necessary is that the court "perceives" one or more of the interests could reasonably and rationally justify the disparate tax rates. See *Beach Communications, Inc.*, 508 U.S. at 315; see also *Stephenson*, 250 Kan. at 774 ("[T]he legislature's purpose in creating the classification need not be established."). *Kellems*, 58 T.C. at 558.

Courts must defer to the legislative branch in the area of taxation because all taxation schemes carry some form of discriminatory impact. *Johnson v. United States*, 422 F. Supp. 958, 971 (N.D. Ind. 1976). "The process of evaluating specific tax proposals and of weighing their relative discriminatory impacts is primarily a legislative, not a judicial, function." *Johnson*, 422 F. Supp. at 974. The burden is on Peden to overcome KITA's presumption of constitutionality and to prove that the disparate tax rates are not rationally related to any of the four valid state interests the State puts forth. *Stephen*, 230 Kan. at 129.

First, the State argues that encouraging marriage is a legitimate State interest. Kansas recognizes a public policy in fostering, protecting, and encouraging marriage.

See *Hill v. Hill*, 228 Kan. 680, 688, 620 P.2d 1114 (1980) (Schroeder, C.J., concurring.) See also *Fincham v. Fincham*, 160 Kan. 683, Syl. ¶ 1 and 2, 165 P.2d 209 (1946) ("Public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together and to prevent separation."). The State points to several statutes which promote Kansas' public policy favoring marriage; K.S.A. 23-101, K.S.A. 23-104a, K.S.A. 23-116 (sanctioning marriage ceremonies); K.S.A. 60-428 (recognizing marital privilege to protect confidential marriage communications); K.S.A. 23-205 (allowing an injured person to pursue a loss of consortium claim on behalf of his or her spouse); K.S.A. 59-504 (providing for intestate succession of surviving spouses). None of these benefits are available to single individuals, even when they are living with a significant other whether of the opposite or same sex.

Finally, in an effort to prove that the encouragement of marriage is a legitimate state interest, the State cites to the following studies which indicate that children are better off being in a family with two parents who are married to each other and that adults are better off, both emotionally and physically, when they are married:

> Couples who merely cohabit, rather than marry, are far less likely to remain together. See Stets, *The Link Between Past and Present Intimate Relationships*, 14 J. of Fam. Issues 236, 251 (1993). Marriage provides a stable, coherent, regulated environment. Ross, Mirowsky & Goldsteen, *The Impact of Family on Health: The Decade In Review*, 52 J. of Marriage & Fam. 1059, 1063 (1990). See Hughes & Gove, *Living Alone, Social Integration, and Mental Health*, 87 Am. J. of Soc. 48 (1981);

Umberson, *Family Status and Health Behaviors: Social Control as a Dimension of Social Integration*, 28 J. of Health & Soc. Behav. 306 (1987). A stable environment is crucial to the developmental needs of children. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 472 (1983). See Hughes & Gove, 87 Am. J. of Soc. at 50. Finally, scientific studies show that marriage is good for the physical, mental, and emotional well-being of the participants. As compared to unmarried persons, married persons exhibit significantly lower rates of alcoholism, suicide, schizophrenia, and other mental disorders. Coombs, *Marital Status and Personal Well-Being: A Literature Review*, 40 Fam. Rel. 97 (1991). Marriage is associated with lower rates of coronary heart disease, stroke, pneumonia, cirrhosis of the liver, automobile accidents, homicide, suicide, anxiety, and depression. Ross, Mirowsky & Goldsteen, 52 J. of Marriage & Fam. at 1061-62. Marriage also has positive and salutary effects on individuals' recovery rates from cancer and other serious illnesses. See Coombs, 40 Fam. Rel. 97. The evidence is overwhelming: marriage is beneficial to individuals and society, on balance. Lichter, *The Retreat from Marriage and the Rise in Nonmarital Fertility*, Report to Congress on Out-of-Wedlock Childbearing 137, 143 (Dep't of Health & Hum. Serv. 1995). Children not in two-parent homes have two to three times more behavioral and psychological problems than do children from intact homes. Zill & Schoenborn, *Developmental, Learning and Emotional Problems: Health of Our Nation's Children, United States*, 1988, Advance Data (Nat'l Center for Health

Stat., Publication #120, Nov. 1990); McLanahan & Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* (Harv. U. Press 1994). Seventy percent of juveniles and young adults serving in long-term correctional facilities came from broken homes. Bureau of Justice Statistics, *Surveys of Youth in Custody, 1987*, p. 1 (U.S. Dep't of Just. 1988). Having two married parents at home also substantially increases the chances that a child will finish his or her education: If a child comes from a single-parent home, that factor alone increases the risk of dropping out of school by a factor of two. McLanahan, *The Consequences of Nonmarital Childbearing for Women, Children and Society*, Report to Congress on Out-of-Wedlock Childbearing 229, 231 (Dep't of Health & Hum. Serv. 1995). Children not living with two biological parents are at greater risk for maltreatment and abuse. Margolin, *Child Abuse by Mother's Boyfriends: Why the Overrepresentation?*, 16 Child Abuse and Neglect 541, 545-46 (1992). The rate of child poverty is five times higher for children living with single mothers than for children in intact families. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1992*, Table 719, p. 457 (112th ed. Washington, D.C. 1992).

As a result, the State contends that society is better off when people are married. Since marriage conveys benefits to children, marriage participants, and society as a whole, the State asserts that the encouragement of marriage is a valid state interest and that it is proper for a state to favor marriage.

Peden takes issue with the State's cite to the studies mentioned above. Peden contends that the State did not

come forward with these studies when it rebutted Peden's motion for summary judgment. Thus, according to Peden, these studies are not a part of the record on appeal and cannot be cited by the State or relied upon by the court. This court has chosen to take judicial notice of these studies. Thus, based on Kansas case law, Kansas statutes, and the studies mentioned above, it is clear that the encouragement of marriage is a valid state interest.

Next, the State argues that the tax rates imposed on single taxpayers* which are higher than the highest tax rate imposed on married taxpayers filing jointly are rationally related to the valid state interest of encouraging marriage. The State argues that the financial incentives created by the lower tax rates for married taxpayers will encourage couples to get married and assist couples financially during the marriage.

Peden argues that KITA is not rationally related to the valid state interest of encouraging marriage because there is no proof that lower tax rates for married taxpayers will actually entice any singles to get married. Peden cites to a case which acknowledges a tax code's incentive potential, but contends that tax codes do not affect marriage in the real world. *Mapes v. United States*, 576 F.2d 896 (Cl. Ct.), *cert. denied* 439 U.S. 1046 (1978). This case provides:

> "For the tax-minded young man, or woman, with a substantial income, the Code adds to the attractiveness of a prospective spouse without taxable income and detracts from one with it. Thus the provisions may have an income-levelling effect. But we have no data showing that as

> yet they operate in that manner. Love and marriage defy economic analysis." 576 F.2d at 898.

Further, Peden asserts that even if income tax rates were an actual incentive to marry, federal income tax laws would act as the real incentive, not the Kansas income tax rates, because the federal income tax rates are approximately five times greater than the Kansas income tax rates. Thus, Peden contends that the Kansas income tax rates at issue have not been proven by any data to actually entice single persons to get married and thus are not rationally related to the valid state interest of encouraging marriage.

This argument is unpersuasive because the State is not required to come forward with *data* that the tax rates are rationally related to the valid state interest of encouraging marriage. As the State points out, "a legislative choice is not subject to courtroom factfinding and may be based on rational *speculation* unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). (Emphasis added.) It is certainly a rational speculation to assume that imposing a lower tax rate on married taxpayers will entice singles to get married and encourage married couples to stay together. Many tax benefits are based on the rationale that they will entice a taxpayer to behave in a certain way. For instance, Congress provides tax benefits to charitable organizations to "encourage the development of private institutions that serve a useful public purpose." *Bob Jones University. v. United States*, 461 U.S. 574, 587-88, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983). To encourage home ownership, Congress allows deductions for mortgage interest and related costs regardless of

the taxpayer's income level or marital status. 26 U.S.C. § 163(h)(2)(D), (h)(3) (1994). To encourage saving, Congress allows for tax-deferred IRAs and 401(k) plans. 26 U.S.C. § 401(k) (1994); 26 U.S.C. § 408 (1994). Thus, it is rational for the State to speculate that favorable tax treatment for married taxpayers in the form of lower rates will encourage single taxpayers to get married and stay married, thereby fulfilling a valid state objective, even though the State has not put forth any hard data to prove this assumption.

Under the rational basis standard, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' " *Beach Communications, Inc.*, 508 U.S. at 315. Peden has not come forward with any data to negate this conceivable basis and prove that lower tax rates for married taxpayers do not in fact encourage single taxpayers to marry. All Peden has done is argue that if income tax rates encourage taxpayers to marry, it is the federal income tax rates which would act as the actual incentive, not the Kansas income tax rates, because the federal income tax rates are approximately five times greater than the Kansas income tax rates. It may be true that federal income tax rates provide an incentive for couples to marry. However, this does not mean that the Kansas income tax rates would not also provide an additional incentive for taxpayers to get married. Further, if two taxpayers earn approximately the same amount of taxable income, they will be discouraged from getting married under the federal income tax laws due to the marriage penalty. Thus, the lower Kansas tax rates for married couples may counteract the federal marriage penalty to

some degree and prevent couples from being discouraged to marry. Thus, it is not clear that the federal income tax rates are the only tax rates which affect a taxpayer's decision to marry. It is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married. See *Druker*, 697 F.2d at 50 ("In the area of family taxation every legislative disposition is 'virtually fated to be both overinclusive and underinclusive when judged from one perspective to another.' ").

Further, even though the State is not required to come forward with data supporting its rational basis, there is some evidence indicating that lower tax rates for married taxpayers do in fact encourage singles to marry. *Druker*, 697 F.2d at 50 ("marriage penalty" caused couple to divorce). In *Mapes*, 576 F.2d at 901, the court stated:

> "[T]he elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage. More often it changes the relative attraction of different prospective spouses for the tax-minded individual wishing to marry. *For many it provides an incentive to marry*. The additional tax liability suffered by two-income couples who cannot avail themselves of the rates for single persons is an indirect burden on the exercise of the right to marry. It is suffered not for marrying but for marrying one in a particular income group." (Emphasis added.)

Thus, the Mapes court acknowledged that favorable or disfavorable tax treatment can affect a couple's decision to marry. In the end, the *Mapes* court ruled that the

federal marriage penalty was not a constitutional violation of equal protection because it was rationally related to a valid state interest.

It is rational to speculate that lower tax rates for married taxpayers will entice singles to marry and stay married in order to receive the benefit of the lower rates, even if there is no data to prove this speculation in reality. Importantly, there is no data put forth by Peden to disprove this speculation. As such, the discriminatory classifications of single taxpayers, who are subjected to high tax rates, and married taxpayers, who receive lower tax rates, are rationally related to the valid state interest of encouraging marriage. Thus, the fact that KITA imposes tax rates on single taxpayers which are higher than the highest tax rate imposed on married taxpayers filing jointly is not an unconstitutional violation of equal protection. It is true that the higher single tax rates never even out with the married rates, no matter how much money the married taxpayers earn. However, the benefits of marriage to society never cease, no matter how wealthy the married taxpayers become. Thus, the encouragement of taxpayers to marry and stay married, such as through lower tax rates for married taxpayers, should never cease either, no matter how wealthy the married taxpayers become. Further, all taxation schemes carry some form of discriminatory impact. *Johnson*, 422 F. Supp. at 971. "The process of evaluating specific tax proposals and weighing their relative discriminatory impacts is primarily a legislative, not a judicial, function." 422 F. Supp. 974. Thus, we defer to the legislature and find that KITA is not an unconstitutional violation of equal protection.

Reversed.

McFarland, C.J., and Davis, not participating.

Robert J. Lewis, Jr., J., and Richard W. Wahl, Senior Judge, assigned.[1]

---

[1] **REPORTER'S NOTE:** Pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c), Judge Lewis of the Court of Appeals was appointed to hear case No. 75,205 vice Chief Justice McFarland. Pursuant to the authority vested in the Supreme Court by K.S.A. 20-2016, Judge Wahl was appointed to hear case No. 75,205 vice Justice Davis.

APPENDIX B

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION ELEVEN

ERIC PEDEN, Plaintiff,	)	Case No. 93 CV 415
vs.	)	
STATE OF KANSAS, et al. Defendants.	)	

MEMORANDUM OF DECISION

THIS MATTER COMES on before the Court on the Motion of both parties for Summary Judgment in their favor. It is conceded that this is a matter that should be disposed of on the legal issues by summary judgment in favor of the whichever party should legally prevail. There is no substantial dispute about the facts of the case to the effect that the Plaintiff is a single taxpayer and will be responsible for payment of 1993 taxes as such. The Statement of Fact #4 by the Plaintiff is as follows:

> "For the calendar years 1988, 1989, 1990, 1991 and 1992, Plaintiff paid income tax to the State of Kansas at a rate that exceeded the highest income tax rate that applied to taxpayers filing under the status of 'married filing joint'. For the calendar year 1993 Plaintiff will be required to pay by April 15th, 1994, income tax to the State of Kansas at a rate that will exceed the highest income tax rate that will apply to

> taxpayers filing under the status of 'married filing joint.' "

The State concedes these facts but makes some additional statements of fact in its response to Plaintiff's motion.

Both parties concede that the single issue before the Court for determination is whether it is permissable [sic] for the State of Kansas to tax unmarried individuals at income tax rates which exceed the highest rates charged to married individuals. The Plaintiff alleges that this is a unique constitutional issue in that the Kansas tax rate structure discriminates against unmarried individuals contrary to the Equal Protection clause of the 14th Amendment of the United States Constitution, and Article 11, Section 2 of the Kansas Constitution. The Defendants, on the other hand, urge that the discrimination, if any exists, is permissable [sic] by reason of the great latitude that courts allow Legislatures and their Administrative agencys [sic] in formulating a tax structure. The State indeed concedes that the tax rates complained of by the Plaintiff are discriminatory as between a single taxpayer and a married couple taxpayers claiming joint return status. Plaintiff asserts that this discriminatory distinction has no rational basis and therefore must be condemned as unconstitutional. Plaintiff's examples do demonstrate that rates of tax charged single taxpayers are higher and remain higher in the upper brackets than married taxpayers, and this disparity is never corrected. Again, both Plaintiff and Defendant are in agreement that the issue must be resolved by application of the two-pronged rational basis test that is (1) whether there is a legislative purpose for the classification, and (2) whether

the classification rationally furthers that legislative purpose. There has been no rational basis for the distinction articulated by the Kansas Legislature, the Kansas Courts, or the executive agencies administering the Kansas tax law. In the Court's view the weakness of the Defendant's attempt to rationalize this disparity is exhibited by the lengths to which the Defendant goes to postulate some reasonable explanation for the obvious discrimination. Even recognizing that the Defendant State is allowed a great deal of latitude, the Court finds no rational basis for the discrimination. The fact that supposedly married couples have a greater economic burden is highly speculative and subject to a great deal of question and uncertainty. That the public policy of the State of Kansas promotes marriage through its tax structure is almost fanciful when analytically examined. The same can be said of the proposition that married individuals are less likely to relocate and will remain a stable economic unit for the State for longer periods of time. This leaves "ease of administration" and again this Court finds that to be speculative and conjectural. None of the reasons, therefore, advanced by the State would seem to justify the gross disparity and discrimination that exists in the tax rate structure between single individuals and married individuals. Therefore the Court adopts the Plaintiff's theories and rationale and declares that the tax rate structure attacked is vulnerable on a constitutional theory and should be struck down.

Plaintiff correctly observes that historically splitting mechanisms and their variations have been approved by the Federal Courts as a method of legitimately "discriminating" in favor of married and against single taxpayers.

Also approved were various adjustments to accommodate taxpayers in "non-community property" states. *Plaintiff Memorandum pp 9-12.* This all occurred in the federal system where there is a comprehensive legislative history of dealing with these issues. There is a total lack of legislative history or indeed any real analytical treatment of this problem of discrimination by the State of Kansas. There can be no disagreement that there are discriminatorily higher rates of tax paid by single Kansas taxpayers and there is no rational justification for such.

Judgment is therefore granted on the Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Summary Judgment is denied.

/s/ Matthew J. Dowd
MATTHEW J. DOWD
DISTRICT JUDGE
DIVISION ELEVEN

DATE: 9-7-94

APPENDIX C

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION ELEVEN

ERIC PEDEN, Plaintiff,	)	Case No. 93 CV 415
v.	)	
STATE OF KANSAS, et al., Defendants.	)	

JOURNAL ENTRY

The above entitled cause was heard on September 2, 1994, on Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment, with Plaintiff appearing by counsel of Eric C. Peden and Steven J. Schleicher of the law firm Schleicher, Latz, Loyd & Patterson, P.C., and Defendants appearing by counsel of Frank S. Reeb and Vernon L. Jarboe of the Legal Services Bureau, Kansas Department of Revenue. All parties filed briefs and statements of material facts regarding their respective motions, and the Court heard the pleadings, the evidence and arguments of counsel, and upon due consideration, the Court issued a Memorandum of Decision dated September 7, 1994.

On this 4 day of November, 1994, Judgment is entered as follows:

I.

This Court has jurisdiction of the parties and of the subject matter of the action under Counts I, II and III of Plaintiff's Petition, and Judgment is hereby entered in favor of the Plaintiff and against the Defendants on Plaintiff's claims pursuant to Counts I, II and III of Plaintiff's Petition.

II.

The provisions of K.S.A. 79-32,110 in effect from 1988 to the present, and as applied prospectively, are hereby declared to be null, void and inoperative, as being in conflict with the Fourteenth Amendment of the Constitution of the United States, to the extent that the income tax rates applicable to unmarried individuals exceed the highest income tax rates charged to married individuals filing under the status of "married filing joint."

III.

The provisions of K.S.A. 79-32,110 in effect from 1988 to the present, and as applied prospectively, are hereby declared to be null, void and inoperative, as being in conflict with Article 11, §2 of the Constitution of the State of Kansas, to the extent that the income tax rates applicable to unmarried individuals exceed the highest income tax rates charged to married individuals filing under the status of "married filing joint."

IV.

The provisions of this Judgment applicable to the Defendants shall also apply to any of the respective Defendants' successors, officers, agents, servants, employees and representatives, together with any other person, firm or agency acting in or on a Defendant's behalf or under a Defendant's direction and control.

V.

The findings are reasons of the Court as contained in its Memorandum of Decision dated September 7, 1994, are hereby incorporated by reference herein.

VI.

The Court hereby reserves jurisdiction to modify this Judgment and to make any further orders or judgments in this cause as may be considered necessary or appropriate for the construction or carrying out of this Judgment, for the modification or supplementation of any of its provisions, for the enforcement of compliance with it and/or for the punishment of violations.

IT IS SO ORDERED.

/s/ Matthew J. Dowd
MATTHEW J. DOWD
DISTRICT JUDGE
DIVISION ELEVEN

DATED: 11-4-94

APPENDIX D

EXCERPTS OF PERTINENT PORTIONS OF KANSAS STATUTES ANNOTATED [ARTICLE 79-32 "INCOME TAX"]

SECTION 79-32,110 (1996 Supp.):

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000.....	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000.....	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $20,000.....	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000.....	$1,630 plus 7.75% of excess over $30,000

(b) *Nonresident Individuals.* A tax is hereby imposed upon the Kansas taxable income of every nonresident individual, which tax shall be an amount equal to the tax computed under subsection (a) as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income."

SECTION 79-32,110 (1989):

"**79-32,110. Tax imposed; classes of taxpayers; rates.** (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $35,000=	3.65% of Kansas taxable income
Over $35,000=	$1,278 plus 5.15% of excess over $35,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $27,500=	4.5% of Kansas taxable income
Over $27,500=	$1,238 plus 5.95% of excess over $27,500

In lieu of the tax schedules hereinbefore prescribed, any individual taxpayer who elects to deduct federal

income tax liability as defined by K.S.A. 79-32,120, and amendments thereto, from Kansas adjusted gross income, shall compute tax liability in accordance with the following tax schedules:

(3) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $20,000=	4.75% of Kansas taxable income
Over $20,000 but not over $35,000=	$950 plus 5% of excess over $20,000
Over $35,000 but not over $45,000=	$1,700 plus 8.5% of excess over $35,000
Over $45,000=	$2,550 plus 8.75% of excess over $45,000

(4) *All other individuals.*

If the taxable income is:	The tax is:
Not over $2,000=	4.75% of Kansas taxable income
Over $2,000 but not over $10,000=	$95 plus 5.6% of excess over $2,000
Over $10,000 but not over $20,000=	$543 plus 5.75% of excess over $10,000
Over $20,000 but not over $30,000=	$1,118 plus 8.5% of excess over $20,000
Over $30,000=	$1,968 plus 8.75% of excess over $30,000

(b) *Nonresident Individuals.* A tax is hereby imposed upon the Kansas taxable income of every nonresident individual, which tax shall be an amount equal to the tax

computed under subsection (a) as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income."

SECTION 79-32,110 (L. 1988, ch. 381, § 2):

"**79-32,110. Tax imposed; classes of taxpayers; rates.** (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $35,000.....	4.05% of Kansas taxable income
Over $35,000	$1,418 plus 5.3% of excess over $35,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $27,500.....	4.8% of Kansas taxable income
Over $27,500	$1,320 plus 6.1% of excess over $27,500

(b) *Nonresident Individuals.* A tax is hereby imposed upon the Kansas taxable income of every nonresident individual, which tax shall be an amount equal to the tax computed under subsection (a) as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income."

APPENDIX E

STATE OF KANSAS
[SEAL]

Nancy Parrish, Secretary of Revenue
Robert B. Docking
State Office Building (913) 296-3041
915 S.W. Harrison St. FAX (913) 296-7928
Topeka, Kansas 66612-1588 Information (913) 296-3909

Department of Revenue
Office of the Secretary

TO: All Legislators
FROM: Nancy Parrish, Secretary of Revenue NEP
DATE: September 27, 1994
RE: Constitutionality of Kansas Income Tax

I am enclosing a copy of a District Court decision that has the potential of liability greater than the military retiree refund case. On Wednesday, September 7, 1994 District Court Judge Matthew J. Dowd ruled that the Kansas Income tax rate structure (K.S.A. 79-32, 100 from 1988 to the present) is unconstitutional because it favors married individuals filing joint returns over all other individual filers contrary to the Equal Protection clause of the 14th Amendment of the United States Constitution, and Article 11, Section 2 of the Kansas Constitution. Unlike the military retirement refund case, the Court in this case has denied plaintiff's motion to certify this case as a class action.

Judge Dowd ruled that single filers are subjected to income tax rates that are higher than the highest rates applicable to married individuals filing jointly. The decision is being analyzed by the Kansas Department of

Revenue to determine the potential liability. Estimates of the *potential* refund liability are still very rough but if the ruling means that the top two rates for single filers can't be higher than the top rate for married individuals filing jointly, then the *tax* liability (not including interest) is $16 million per year or $48 million dollars for the three open tax years. If the ruling is that the single filer rates for each bracket must be identical to the brackets for married individuals, then the tax refund liability is $50 million per year or $150 million for the three year period. Based on the Department's interpretation of the Court ruling, we believe that the estimated tax amount would be $48 million plus interest.

The Department will appeal the District Court decision to the Supreme Court. Under state law whenever a District Court declares a state statute unconstitutional, it can be appealed directly to the Supreme Court. It is unclear when the Supreme Court would hear the case. If the District Court ruling stands, the state will be enjoined from assessing taxes in the future on single filers at a rate in excess of the highest rate for married individuals filing jointly.

Prior to 1988, Kansas income tax rates for joint filers and single filers were the same although the brackets were different. At that time, married couples filing jointly paid about 74% of the total amount of Kansas income taxes collected while individuals filing singly paid about 26%. When changes were made to the income tax statutes in 1988, the state tried to retain the same proportional burden between married individuals filing jointly and single filers. This was accomplished through differential rates for married individuals filing jointly and all others.

When the income tax statutes were changed in 1992, the differential in rates between married joint filers and other filers increased. (See attached chart for the current tax rates.)

Although no court has addressed the differential between married joint filers and single filer *rates,* the United States Tax Court and the Second Circuit Court of Appeals upheld different tax brackets for married individuals filing jointly and single filers.

During the 1995 legislative session, the legislature should consider eliminating the differential in rates between married individuals filing jointly and single filers. There are several different options that should be reviewed.

Please feel free to give me a call if you have any questions or if you need additional information.

Supreme Court, U.S.
FILED
APR 14 1997
OFFICE OF THE CLERK

No. 96-1459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ERIC PEDEN AND SHARON L. SMITH,
for themselves and all others similarly situated,
Petitioners,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Kansas

---

RESPONDENTS' BRIEF IN OPPOSITION

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

RICHARD OXANDALE
General Counsel
FRANK REEB
KANSAS DEPARTMENT OF REVENUE
915 S.W. Harrison Street
Topeka, Kansas 66612
(913) 296-2381

Counsel for Respondents

QUESTION PRESENTED

Whether Kansas' income tax code, which imposes different tax rates upon married taxpayers filing joint returns than upon individual filers, satisfies the rational basis test of the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Kansas Supreme Court were the same as those named in the caption.

Pursuant to this Court's Rule 35.3, respondents note the following: Nancy Parrish and Alisa Dotson, who are named as respondents in the caption, were sued in their official capacities as Secretary of Revenue and Director of Taxation, respectively. Neither Ms. Parrish nor Ms. Dotson holds these positions at present. Kansas' current Secretary of Revenue is John LaFaver; the position of Director of Kansas' Division of Taxation is currently vacant; at present, Secretary LaFaver also holds the position of acting Director of Taxation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE WRIT 8

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF WELL-ESTABLISHED EQUAL PROTECTION CLAUSE PRINCIPLES 9

II. THE KANSAS SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS OR ANY OTHER COURT 15

III. THE SUPPOSEDLY "UNIQUE" QUESTION PRESENTED BY THIS CASE IS NOT LIKELY TO RECUR 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Adams v. Robertson, 117 S. Ct. 1028 (1997) (*per curiam*) 12, 14
Bob Jones University v. United States, 461 U.S. 574 (1983) 6
Chandler v. Central Oil Corp., 853 P.2d 649 (1993) 10
Dandridge v. Williams, 397 U.S. 471 (1970) 11
Druker v. Commissioner of Internal Revenue, 697 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) 3, 7, 10, 13, 14
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 6, 7, 12, 15
Faraco v. Commissioner of Internal Revenue, 261 F.2d 387 (4th Cir. 1958), *cert. denied*, 359 U.S. 925 (1959) 12
Hartman v. State Commission of Rev. and Taxation, 187 P.2d 939 (Kan. 1947) 2
Heller v Doe, 509 U.S. 312 (1993) 14, 15
Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd*, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978) . . . 12
Kellems v. Commissioner of Internal Revenue, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973) 4, 16
Madden v. Kentucky, 309 U.S. 83 (1940) 5, 8
Mapes v. United States, 576 F.2d 896 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978) 4, 7, 13, 14
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (*per curiam*) 11
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 15
Missouri Pacific R.R. v. McDonald, 486 P.2d 1347 (Kan. 1971), *aff'd*, 493 P.2d 280 (Kan. 1972) 2
New York Transit Authority v. Beazer, 440 U.S. 568 (1979) 11

TABLE OF AUTHORITIES (Cont'd)

Page

Nordlinger v. Hahn, 505 U.S. 1 (1992) 15
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 17
Romer v. Evans, 116 S. Ct. 1620 (1996) 15, 16
Sowders v. Oklahoma Tax Commission,
552 P.2d 698 (Okla. 1976) 4, 16
Turner v. Safley, 482 U.S. 78 (1987) 10
U.S.D. 229 v. State of Kansas, 885 P.2d 1170 (Kan. 1994),
cert. denied, 115 S. Ct. 2582 (1995) 12
United States Railroad Retirement Board v. Fritz,
449 U.S. 166 (1980) 15
Vance v. Bradley, 440 U.S. 93 (1979) 15
Weinberger v. Salfi, 422 U.S. 749 (1975) 11
Zablocki v. Redhail, 434 U.S. 374 (1978) 14

Constitutional Provisions and Statutes

U.S. Const. amend. XIV, § 1 . . . . . 2, 9
Kan. Const. art. 11, § 2 2
26 U.S.C. § 1 (1994) 10
26 U.S.C. § 163(h) (1994) 6
26 U.S.C. § 401(k) (1994), *as amended by*
Pub. L. No. 104-188, 110 Stat. 1789 (1996) 6
26 U.S.C. § 408 (1994), *as amended by*
Pub. L. No. 104-188, 110 Stat. 1792 (1996) 6
26 U.S.C. § 2001 (1994) 10
26 U.S.C. § 2056 (1994) 10
26 U.S.C. § 6013 (1994), *as amended by*
Pub. L. No. 104-188, 110 Stat. 1459 (1996) 9, 12
Kan. Stat. Ann. § 23-101 (1996 Supp.) 10
Kan. Stat. Ann. § 23-104a (1996 Supp.) 10
Kan. Stat. Ann. § 116 (1995) 10
Kan. Stat. Ann. § 23-205 (1995) 10
Kan. Stat. Ann. § 59-504 (1989) 10
Kan. Stat. Ann. § 60-428 (1994) 10
Kan. Stat. Ann. § 60-1901 *et seq.* (1994) 10

TABLE OF AUTHORITIES (Cont'd)

Page

Kan. Stat. Ann. § 79-3221(a) (1996 Supp.) 1
Kan. Stat. Ann. § 79-32,109(a) (1989) 1
Kan. Stat. Ann. § 79-32,110(a) (1996 Supp.) 1
Kan. Stat. Ann. § 79-32,115 (1989) 1
Kan. Stat. Ann. § 79-32,117 (1996 Supp.) 1
Kan. Stat. Ann. § 79-32,121 (1989) 1

Miscellaneous Authority

Sjoquist & Walker, *The Marriage Tax and the Rate and Timing of Marriage*, 48 Nat'l Tax J. 547 (1995) . . . 13

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners ask this Court to determine whether the Kansas Supreme Court correctly held that, applying rational basis review, Kansas' income tax rates do not violate the Equal Protection Clause of the Fourteenth Amendment. There is no conflict between the decision below and the decision of any other court. The decision of the Kansas Supreme Court constitutes a routine application of well-established equal protection principles and does not merit this Court's review. In any event, the statute has recently been repealed by the Kansas legislature.

STATEMENT

The background of this case is as follows:

The Tax At Issue. The State of Kansas imposes a tax upon "the Kansas taxable income of every resident individual." Kan. Stat. Ann. § 79-32,110(a) (1996 Supp.). Under Kansas law, individual income tax filers pay income tax based upon their own Kansas taxable income; married couples who elect to file a joint return have their Kansas taxable income determined "as if husband and wife were one individual taxpayer." Kan. Stat. Ann. § 79-32,115(a) (1989).[1]

The Kansas Income Tax Act ("KITA") is fashioned after, and in large part dependent upon, the Federal income tax return. *See, e.g.*, Kan. Stat. Ann. § 79-3221(a) (1996 Supp.); Kan. Stat. Ann. 79-32,109(a) (1989). A taxpayer's "Kansas taxable income" is calculated using Federal adjusted gross income as a base, and making certain additions and subtractions to arrive at Kansas adjusted gross income. Kan. Stat. Ann. § 79-32,117(a)-(d) (1996 Supp.). Kansas taxable income is ultimately calculated by subtracting Kansas deductions and personal exemptions from Kansas adjusted gross income.

For the tax years at issue in this case (1988 to 1996), KITA contained two sets of tax rate schedules. Pet. App. 6a-8a. One

---

[1] Kansas taxpayers must file their state tax returns under the same filing status as they use on their Federal income tax return. Kan. Stat. Ann. §§ 79-32,115(b)-(e); 79-32,121 (1989).

set of rate schedules applied only to married taxpayers who elected to file joint returns; the other set of schedules applied to all other, individual, filers. *Id.* The rates applicable to the combined incomes of married persons filing jointly were somewhat lower than the rates applicable to individual filers — for instance, in tax year 1995, a married couple with $20,000 each in Kansas taxable income would pay 3.5% income tax on the first $30,000 of their income ($1,050), plus 6.25% tax on the last $10,000 of their income ($625), for a total of $1,675. If the couple were unmarried (or married but electing to file separately) with $20,000 each in Kansas taxable income, each would pay 4.4% income tax on their $20,000 in income ($880 each), for a total of $1,760 — $85 more than two married persons filing jointly. If one of the couple had $40,000 in Kansas taxable income, and the other none, their Kansas income tax, if married filing jointly, would still be $1,675, but if they filed individually would be $2,405 — $730 more. The differences generally became greater as the taxpayers' incomes increased.

Proceedings In The District Court. On April 14, 1993, petitioner Peden brought this suit against respondents in the Shawnee County (Kansas) District Court, claiming that the rate differentiation between married, joint-filing taxpayers and all other taxpayers violated both the Equal Protection Clause and Article 11, § 2 of the Kansas Constitution.[2] Pet. App. 8a-9a.

After a series of procedural rulings by the district court (Pet. App. 9a-10a), Peden brought a motion for summary judgment. In that motion, Peden urged that KITA's distinction between

---

[2] Article 11, § 2 of the Kansas Constitution provides that "[t]he state shall have power to levy and collect taxes on incomes from whatever source derived, which taxes may be graduated and progressive." The Kansas Supreme Court has held that the rational basis test applicable under the Federal Equal Protection Clause also applies under this state constitutional provision. *Missouri Pac. R.R. v. McDonald,* 486 P.2d 1347, 1353 (Kan. 1971), *aff'd,* 493 P.2d 280 (Kan. 1972); *Hartman v. State Comm'n of Rev. and Taxation,* 187 P.2d 939, 946 (Kan. 1947).

married taxpayers filing jointly and individual-filing taxpayers ran afoul of the Equal Protection Clause under the rational basis test. Record Vol. I, p. 134; *see also* Pet. 8. Peden also disclaimed any theory of heightened Equal Protection Clause scrutiny:

> *In the present case, the appropriate constitutional standard of review* for determining whether the Kansas statutory scheme violates equal protection guarantees *is the rational basis test.* The law is clear that, unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, equal protection only requires that a classification rationally further a legitimate state interest. . . . *Plaintiff is not alleging that the Kansas income tax rate classification between unmarried and married taxpayers impinges on a fundamental right or categorizes on the basis of an inherently suspect classification.*

Record Vol. I, p. 130 (emphasis added) (citations omitted). Peden relied entirely on legal argument in support of his motion for summary judgment; he submitted no evidence to support that motion, nor did he seek an evidentiary hearing.

The State opposed Peden's motion for summary judgment and moved for summary judgment in its own right. *See* Record Vol. I, pp. 151-66. The State urged that the statutory differentiation between married joint-filing taxpayers, and taxpayers filing individually, was in fact supported by several rational bases, including, *inter alia,* (1) promoting marriage in the State of Kansas, (2) alleviating the additional financial burdens felt by married couples, and (3) easing the State's administrative costs by encouraging the filing of a joint tax return whenever possible. The State pointed out that similar distinctions between married and unmarried taxpayers have been upheld both in the Federal income tax system and in at least one state income tax code.[3] While there

---

[3] *See, e.g., Druker v. Commissioner of Internal Revenue*, 697 F.2d 46, 50-51 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) ("marriage

was no difference between the tax percentage rates applicable in those cases, the effective tax rates differed because only married taxpayers were allowed to combine their incomes and have their combined incomes taxed as a unitary whole, in different income brackets.

Five days after hearing oral argument, the Shawnee County District Court granted Peden's motion for summary judgment, and denied the State's motion, in a short opinion devoid of citation. Pet. App. 41a-44a. The district court ostensibly utilized a rational basis test — i.e., "(1) whether there is a legislative purpose for the classification, and (2) whether the classification rationally furthers that legislative purpose." Pet. App. 42a-43a.

The district court did not take issue with the legitimacy of the State's asserted legislative purposes, but it concluded that the State's classification did not rationally further any of those purposes. The district court rejected the assertion that "the public policy of the State of Kansas promotes marriage through its tax structure" as "almost fanciful when analytically examined." *Id.* It rejected the possibility that "married couples have a greater economic burden" as "highly speculative and subject to a great deal of question and uncertainty." *Id.* And it similarly rejected "ease of administration" as a rational basis for the disparity, finding such a rationale "speculative and conjectural." *Id.* On this reasoning, the district court declared the Kansas income tax structure unconstitutional. *Id.*

Proceedings In The Kansas Supreme Court. The State appealed the district court's judgment to the Supreme Court of Kansas, urging that the district court had misunderstood and misapplied the rational basis test in striking down the Kansas income tax structure. The State argued that, had the district court

---

penalty"); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978) (same); *Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973) ("singles penalty"); *Sowders v. Oklahoma Tax Comm'n*, 552 P.2d 698 (Okla. 1976) (same).

properly understood and applied the rational basis test, it would have found that the tax structure was supported by several rational bases, including (1) the promotion and preservation of marriage, (2) the alleviation of financial burdens generally associated with marriage, (3) the alleviation of a specific financial burden — the Federal income tax code's "marriage penalty" — that is associated with marriage of dual income taxpayers, and (4) encouraging taxpayers who can file joint returns to do so, in order to lower the State's administrative costs.

Petitioners, as appellees below, did not dispute that Kansas has legitimate interests in favoring marriage, alleviating the financial burdens associated with marriage, alleviating the Federal marriage penalty, and encouraging joint returns. Instead, their arguments rested entirely upon their claim that the impact of the tax rate schedules on those interests was unproven and that the structure of the tax rate schedules was not adequately tailored to further these legitimate goals. Petitioners' arguments in the Kansas Supreme Court, like their arguments in the district court, relied entirely on a rational basis analysis.

On December 20, 1996, a unanimous Kansas Supreme Court reversed the district court's judgment. Noting that "the legislature possesses the greatest freedom of classification in the area of taxation" (Pet. App. 28a, *citing Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940)), the court concluded that the classification drawn by the Kansas legislature was reasonable and therefore constitutional under the Equal Protection Clause's rational basis test. Based upon Kansas statutes and case law, and upon a series of empirical studies regarding the benefits of marriage to the participants, children, and society as a whole, the Court concluded that "the encouragement of marriage is a valid state interest." Pet. App. 35a. The court further concluded that "it is rational for the State to speculate that favorable tax treatment for married taxpayers in the form of lower rates will encourage single taxpayers to get married and stay married, thereby fulfilling a valid state objective." Pet. App. 37a.

The court rejected petitioners' "extreme critique" (Pet. App. 28a) that "KITA is not rationally related to the valid state interest of encouraging marriage because there is no proof that lower tax rates for married taxpayers will actually entice any singles to get married." Pet. App. 35a. It called petitioners' argument "unpersuasive because the State is not required to come forward with *data* that the tax rates are rationally related to the valid state interest of encouraging marriage." Pet. App. 36a. The court explained the rational basis standard:

> As the State points out, "a legislative choice is not subject to courtroom factfinding and may be based on rational *speculation* unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). (Emphasis added.) It is certainly a rational speculation to assume that imposing a lower tax rate on married taxpayers will entice singles to get married and encourage married couples to stay together.

Pet. App. 36a. The court noted that "[m]any tax benefits are based on the rationale that they will entice a taxpayer to behave in a certain way," *id.*, and gave several examples of tax provisions that encourage certain beneficial behaviors. Pet. App. 37a.[4] The court ultimately held that "it is rational for the state to speculate that favorable tax treatment for married taxpayers in

---

[4] "For instance," the court explained:

> Congress provides tax benefits to charitable organizations to "encourage the development of private institutions that serve a useful public purpose." *Bob Jones University v. United States*, 461 U.S. 574, 587-88, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983). To encourage home ownership, Congress allows deductions for mortgage interest and related costs regardless of the taxpayer's income level or marital status. 26 U.S.C. § 163(h)(2)(D), (h)(3) (1994). To encourage saving, Congress allows for tax-deferred IRAs and 401(k) plans. 26 U.S.C. § 401(k) (1994); 26 U.S.C. § 408 (1994).

Pet. App. 37a.

the form of lower rates will encourage single taxpayers to get married and stay married." Pet. App. 36a-37a.

The court further explained that it was petitioners' burden, not the State's, to "'negative every conceivable basis which might support'" the rationality of the legislative classification. Pet. App. 37a (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. at 315). Petitioners had failed to satisfy this burden, the court explained, because they had

> not come forward with any data to negate this conceivable basis [of encouraging marriage] and prove that lower tax rates for married taxpayers do not in fact encourage single taxpayers to marry. . . . It is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married.

Pet. App. 37a-38a. In the Kansas Supreme Court's view, it was fatal to petitioners' constitutional argument that "there is no data put forth by Peden to disprove this speculation." Pet. App. 39a.

The court noted that "even though the State is not required to come forward with data supporting its rational basis," there was in fact some evidence "indicating that lower tax rates for married taxpayers do in fact encourage singles to marry." Pet. App. 38a.[5] The court also held that "the lower Kansas tax rates for married couples may counteract the federal marriage penalty to some degree and prevent couples from being discouraged to marry." Pet. App. 37a-38a. The Kansas Supreme Court thus

---

[5] The court cited an opinion authored by Judge Friendly, in which the federal income tax code's "marriage penalty" in fact caused a couple to divorce by their own admission, *Druker v. Commissioner of Internal Revenue*, 697 F.2d at 50, as well as an opinion from the former Court of Claims which concluded that the marriage penalty "[m]ore often . . . changes the relative attraction of different prospective spouses for the tax-minded individual wishing to marry," and "[f]or many . . . provides an incentive to marry." Pet. App. 38a (quoting *Mapes v. United States*, 576 F.2d at 901).

held that the state's income tax structure was constitutional, and reversed the judgment of the district court. Pet. App. 39a.

Subsequent Developments. Since the decision of the Kansas Supreme Court in this case, the Governor of Kansas proposed, and the Kansas legislature has now passed, amendments to KITA which, over a three-year period, remove the tax rate differential and lower the rates of single taxpayers to match those rates paid by married Kansans.[6] The Governor of Kansas signed the bill into law on April 4, 1997. Section 13 of House Bill 2031, which contains these amendments, is attached as an appendix to this brief. App. 1a-4a.

REASONS FOR DENYING THE WRIT

Petitioners have shown no basis for certiorari. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification," *Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940), and the Kansas legislature did not transgress the limits of that broad freedom in taxing married, joint income tax filers differently than all other, individual filers. The Kansas Supreme Court correctly applied well-established equal protection principles in upholding that income tax structure. There is no conflict with any decision of this or any other court. This unexceptional application of settled law does not merit this Court's review.

In all events, the issue presented by the petition is not likely to recur. Petitioners' challenge to the Kansas income tax structure is, as petitioners repeatedly stress, based upon the supposedly "unique" features of the statute.[7] The issue is thus unlikely to

---

[6] While the rates will be the same, the maximum rate applies at a lower income level in the case of individual taxpayers than in the case of married taxpayers filing jointly. Petitioners have not argued that this distinction would be unconstitutional.

[7] As discussed below, the Kansas statute — which provides lower tax percentage rates for married taxpayers filing jointly — is in fact indistinguishable in principle from federal and state income tax statutes that provide lower effective tax rates for married taxpayers through

occur in any other state. Nor is it likely to recur in Kansas: the income tax structure at issue has now been repealed by the Kansas legislature. Certiorari should be denied.

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF WELL-ESTABLISHED EQUAL PROTECTION CLAUSE PRINCIPLES

The Kansas Supreme Court applied well-established and uncontroversial equal protection principles to conclude that the statutory distinction between married, joint-filing taxpayers and individual filers was a rational means for furthering the state's concededly legitimate interest in encouraging marriage.[8] The court concluded that it was rational for a legislature to "speculate that lower tax rates for married taxpayers will entice singles to marry and stay married" (Pet. App. 39a), even in "the absence of legislative history concerning the disparate tax rates." Pet. App. 22a.

This was hardly an exceptional holding. It is both appropriate and common for a government to treat married couples and unmarried individuals differently, for purposes of taxation and otherwise. The Federal tax code, for instance, allows only married people to benefit from income-splitting — combining their incomes on a single return and having their combined incomes taxed as a whole. 26 U.S.C. § 6013 (1994), *as amended by* Pub. L. No. 104-168, 110 Stat. 1459 (1996). At the same time, however, the rates for married taxpayers increase more rapidly than the rates for single taxpayers as income increases.[9]

---

income-splitting mechanisms.

[8] Petitioners have never disputed, nor do they now dispute the Kansas Supreme Court's holding "that the encouragement of marriage is a valid state interest." Pet. App. 35a. Indeed, the State of Kansas has long recognized "a public policy in fostering, protecting, and encouraging marriage." Pet. App. 31a-32a (citing cases and statutes).

[9] Thus, under the Federal system, a married joint-filing couple pays 15% tax on the first $36,900 of their taxable income, then 28% on the amount up to $89,150, then 31% on the amount up to $140,000, and so

In some circumstances, married taxpayers benefit significantly from the federal tax structure. For example, a married couple with $40,000 in federal taxable income, filing jointly, would pay $6,403 in federal income tax (26 U.S.C. § 1(a)); if one of the couple earned all $40,000, their federal taxes, computed on the basis of the rates applicable to unmarried individuals other than surviving spouses and heads of household, would be $8,327 — $1,924 more than married persons filing jointly. 26 U.S.C. § 1(c).[10]

Federal tax law favors married people in other ways as well. Federal gift taxes paid by a decedent spouse may be credited on the surviving spouse's tax return. 26 U.S.C. § 2001 (1994). Surviving spouses are qualified to take estate tax deductions. 26 U.S.C. § 2056 (1994). In many other contexts beyond the tax code, too, Federal law favors marriage (*see generally Turner v. Safley*, 482 U.S. 78, 96 (1987)), as do state laws.[11] The Kansas Supreme Court's holding was wholly consistent with these well-established distinctions between married and non-married persons.

---

on. A single, individual filer pays the same marginal tax rates of 15%, 28%, and 31%, but the higher tax rates become effective at significantly lower levels of taxable income — $22,100, $53,500, and $115,000. *Compare* 26 U.S.C. § 1(a) (1994) with 26 U.S.C. § 1(c) (1994).

[10] In situations where both members of the couple have similar amounts of taxable income, the tax rates applicable to married persons filing jointly result in a so-called "marriage penalty." *See, e.g., Druker v. Commissioner of Internal Revenue*, 697 F.2d at 49.

[11] Kansas, for example, distinguishes between married and unmarried persons. The State of Kansas sanctions marriage ceremonies (Kan. Stat. Ann. § 23-101 (1996 Supp.), 23-104a (1996 Supp.), § 23-116 (1995)); recognizes common-law marriages (*Chandler v. Central Oil Corp.*, 853 P.2d 649, 652 (1993)); recognizes a marital privilege to protect confidentiality (Kan. Stat. Ann. § 60-428 (1994)); allows spouses to pursue wrongful-death claims (Kan. Stat. Ann. § 60-1901 *et seq.* (1994)) and loss-of-consortium claims (Kan. Stat. Ann. § 23-205 (1995)); and provides for intestate succession for surviving spouses. Kan. Stat. Ann. § 59-504 (1989).

Petitioners nonetheless offer five reasons, all of them unavailing, why the Kansas tax code results in a violation of equal protection. *First,* petitioners say (Pet. 16) that the taxing classification is overbroad because marriage is not available to "many persons," such as minor children and Catholic priests. This is not an appropriate objection under the rational basis test. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). *See also New York Transit Auth. v. Beazer,* 440 U.S. 568, 590-92 (1979) (transit authority's blanket ban on hiring of methadone users had a rational basis even though some methadone users would not pose a safety risk); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314-16 (1976) (*per curiam*) (retirement age of 50 for uniformed police officers "rationally related to the State's objective" of "protect[ing] the public by assuring physical preparedness of its uniformed police," even though some over-50 officers would be physically capable). As in *Weinberger v. Salfi,* 422 U.S. 749 (1975), the Kansas legislature "could rationally have concluded . . . that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777.

Second, petitioners urge (Pet. 17) that Kansas officials have disclaimed the possibility that the "true purpose" of the tax rate distinctions was to favor the state's interest in encouraging marriage. In making this argument, petitioners rely upon a memorandum, authored by then-Secretary of Revenue Nancy Parrish, in which the Secretary supposedly "admit[ted] that the true purpose behind the rate discrimination against singles was to generate a fixed target of tax dollars from singles." Pet. 17. Of course, Secretary Parrish's memorandum did not "admi[t]" that this was the sole or "true purpose" behind the statute. A policy of "retain[ing] the same proportional burden between married individuals filing jointly and single filers" in amending the legislation (Pet. App. 53a) is fully consistent with encouraging marriage through lower tax rates. Moreover, since the legislature's motivations are "entirely irrelevant" to the equal protection

analysis, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), it is difficult to understand how the views of the Secretary of Revenue could be any more relevant.[12]

Third, petitioners suggest (Pet. 24-25) that "the Kansas income tax law conflicts with the income tax laws of the federal government and all other states," none of which "charges excess income tax rates to unmarried taxpayers." Pet. 25 n.9 (citing statutes). In other words, petitioners say that those tax codes merely impose the same tax rates upon different brackets of taxable income, while the Kansas statute under attack imposes different tax rates upon different tax brackets. *See* Pet. i (question presented). There can be no constitutional difference to such a distinction: The Federal government, and most states, tax married couples filing jointly differently than individual filers, often benefitting married taxpayers. Thus, under the Federal tax code, *only* married people may combine their incomes and file a joint income tax return. 26 U.S.C. § 6013. This distinction "according to marital status is not unreasonable." *Faraco v. Commissioner of Internal Revenue,* 261 F.2d 387, 389 (4th Cir. 1958), *cert. denied,* 359 U.S. 925 (1959). *See also Johnson v. United States,* 422 F. Supp. 958, 971 (N.D. Ind. 1976), *aff'd,* 550 F.2d 1239 (7th Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978). Whether accomplished by different rates, or by different brackets, or a combination of both, the result in each case is dif-ferent treatment of married couples, and lower tax rates for mar-ried taxpayers, but in no case is there a violation of equal protection.

---

[12] Citing *U.S.D. 229 v. State of Kansas*, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 115 S. Ct. 2582 (1995), petitioners make the similar claim (Pet. 17) that the Kansas Supreme Court has found that "everything in the [1992 income tax] Act was related to public education — not marriage." The Kansas Supreme Court's *U.S.D. 229* decision did not hold that the tax rates were unrelated to the state's valid interest in encouraging marriage, as petitioners suggest; moreover, petitioners did not see fit to raise this argument in the Kansas Supreme Court below. *See Adams v. Robertson,* 117 S. Ct. 1028, 1029 (1997) (*per curiam*).

Fourth, petitioners argue that "[m]arriage is not simply a person's 'behavior' that can be turned on and off by manipulating the provisions of the Kansas income tax code," so that "[i]n reality, there is no link between the Kansas tax rate disparity and the behavior of marriage." Pet. 16. These are but conclusory statements that are both unsupported by the record and contradicted both by case law and by statistical research.[13] In the district court, petitioners — who had the burden of showing that the distinction lacked a rational basis — never endeavored to prove their assertion that tax rates do not influence marital behavior. They chose instead to rely solely upon attorney argument and rhetorical questions — a strategy they now repeat in the petition. *Compare* Pet. 16-18. Such rhetoric was, and is, no substitute for the required evidentiary showing that Kansas' income tax code lacked a rational basis.

Fifth, petitioners claim (Pet. 20-23) that the Kansas Supreme Court erred by failing to apply "heightened scrutiny" in light of the income tax code's interference with "freedom of personal choice in matters of marriage." This case was litigated by both sides on the theory of rational basis review; petitioners never asked the courts below to apply heightened scrutiny; and indeed, contrary to petitioners' claim that this issue was "preserved" by their complaint (Pet. 21 n.8), they *expressly disclaimed* reliance upon heightened scrutiny in their later summary judgment motion. *See* Record Vol. I, p. 130 (quoted *supra* at p. 3). As in *Heller v. Doe,*

---

[13] *E.g., Druker v. Commissioner of Internal Revenue,* 697 F.2d at 50 ("marriage penalty" caused couple to divorce); *Mapes v. United States,* 576 F.2d at 901 ("the elevated tax burden" created by the federal marriage penalty "might in fact dissuade some couples from entering into matrimony," but "[f]or many it provides an incentive to marry"); Sjoquist & Walker, *The Marriage Tax and the Rate and Timing of Marriage,* 48 Nat'l Tax J. 547, 556 (1995) (concluding, from statistical analysis, "the [federal] marriage tax has a significant negative effect on the timing of marriages" and "causes individuals to postpone marriage" to some degree).

> it would be inappropriate for us to apply [heightened scrutiny] here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.

509 U.S. 312, 319 (1993). *See also Adams v. Robertson,* 117 S. Ct. 1028, 1029 (1997) (*per curiam*) (this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision").

Even if petitioners had not disclaimed heightened scrutiny, it would not have been appropriate in this case. Only statutes that prohibit or "significantly interfere" with the right to marry are subject to heightened scrutiny. *Zablocki v. Redhail,* 434 U.S. 374, 386-87 & n.12 (1978). As several courts have held, because differential tax rates on single or married persons neither prohibit nor significantly interfere with marital decisions, the rational basis test applies to such distinctions in income tax codes. *See, e.g., Druker v. Commissioner of Internal Revenue,* 697 F.2d 46, 50 (2d Cir. 1982) (Friendly, J.), *cert. denied,* 461 U.S. 957 (1983); *Mapes v. United States,* 576 F.2d 896, 901 (Ct. Cl.), *cert. denied,* 439 U.S. 1046 (1978). Petitioners cite no contrary authority. And certainly the difference in income tax involved here — at most a few hundred dollars at the $40,000 income level — would not, as petitioners suggest, prohibit or "significantly interfer[e]" with a person's "freedom of personal choice in matters of marriage." Pet. 21-22. To the contrary, "while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual." *Druker,* 697 F.2d at 50. *See also Mapes,* 576 F.2d at 901.

In sum, there is nothing about the Kansas Supreme Court's proper application of well-established law warranting certiorari in this case.

II. THE KANSAS SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS OR ANY OTHER COURT

Petitioners allege, in the heading of their first argument, that the Kansas Supreme Court "[m]isapplies" rational basis review as recently outlined in *FCC v. Beach Communications, Inc.*, 508 U.S. 307. Pet. 13. Despite that claim, petitioners make no effort, anywhere in their petition, to show how that decision was in fact "[m]isapplie[d]" by the Kansas Supreme Court.

Petitioners say only that the Kansas Supreme Court erred by "glean[ing] from *FCC v. Beach* that 'rational speculation' brings rational basis inquiry to an end." Pet. 14. That was hardly a "misapplication" of *Beach Communications*, which held that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,' . . . [and] because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315. Or, "[i]n other words, a *legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id.* (emphasis added). Petitioners' real complaint is not that the decision conflicts with *Beach Communications* but rather that *Beach Communications* was, in their view, wrongly decided. But the unexceptional propositions articulated in *Beach Communications* and followed by the Kansas Supreme Court in this case (Pet. App. 36a-37a) are supported by a long line of this Court's Equal Protection Clause decisions, *e.g.*, *Heller v. Doe*, 509 U.S. at 319-20; *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

Petitioners also cite this Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), even though they do not allege that the decision below conflicts with *Romer*. *See* Pet. 14-15. In

Romer, this Court concluded that there was an inadequate link (or nexus) between Colorado's proffered justifications for a state constitutional amendment, and the disability imposed by that amendment — a prohibition upon any governmental action designed to protect homosexual persons. 116 S. Ct. at 1629. The court below correctly understood that *Romer* found an equal protection violation because "there was not a close enough nexus between the amendment and the purported valid state interests justifying the amendment." Pet. App. 25a. But, as the Kansas court held, no such lack of nexus exists with respect to the Kansas income tax code: "It is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married." Pet. App. 38a.

The Kansas Supreme Court's decision was also in accord with the only two lower court decisions to have previously addressed the constitutionality of an income tax structure which favors married, joint filers over single persons — *Kellems v. Commissioner of Internal Revenue,* 58 T.C. 556 (1972), *aff'd per curiam,* 474 F.2d 1399 (2d Cir.), *cert. denied,* 414 U.S. 831 (1973), and *Sowders v. Oklahoma Tax Comm'n,* 552 P.2d 698 (Okla. 1976).[14] Petitioners fail to cite, let alone distinguish, either case.

---

[14] In *Kellems v. Commissioner of Internal Revenue,* the unmarried petitioner alleged a violation of equal protection because her income, taxed as a single person, resulted in an income tax of $10,726.34; had her same income been taxed on the schedules applicable to married persons filing jointly, her tax would have been only $7,568.26. 58 T.C. at 557 n.1. The Tax Court rejected Ms. Kellems' argument, and upheld the distinction as rational, because "it is conceivable Congress believed that married persons generally have greater financial burdens than single persons." *Id.* at 559. In *Sowders v. Oklahoma Tax Comm'n,* the Oklahoma Supreme Court upheld a similar distinction in favor of married joint income tax filers on the same reasoning adopted by the Tax Court in *Kellems.* 552 P.2d at 700.

In sum, the decision below conflicts with no decision of this Court or any other court, it is entirely consistent with prior lower-court decisions presenting similar issues, and it does not merit this Court's review.

III. THE SUPPOSEDLY "UNIQUE" QUESTION PRESENTED BY THIS CASE IS NOT LIKELY TO RECUR

Petitioners themselves claim that the precise question presented by this case is not likely to recur in any other state. At every turn, petitioners characterize the distinctions drawn by the Kansas income tax structure at issue as "unprecedented" (Pet. 4, 26), "unique" (Pet. 19, 23), and like "[n]o other." Pet. 25. While this is largely hyperbole on petitioners' part, given that governments routinely — and properly — treat married couples and single individuals differently (see pp. 9-10, above), it only confirms that certiorari is unwarranted on this question. This Court's certiorari review is reserved for questions that are "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Under petitioners' theory, any decision in this case would not be likely to have a significant effect upon future cases in other jurisdictions, and for that reason is unworthy of this Court's review.

The question is not likely to recur in Kansas, either. As noted above (p. 8), both the Kansas Senate and House have now passed, for other than constitutional reasons, and the Governor of Kansas has signed, legislation which will amend KITA and remove the distinction in tax rates that petitioners challenged in the Kansas courts below. This Court should not grant certiorari to determine the constitutionality of a defunct provision of the Kansas income tax code.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

RICHARD OXANDALE
General Counsel
FRANK REEB
KANSAS DEPARTMENT OF REVENUE
915 S.W. Harrison Street
Topeka, Kansas 66612
(913) 296-2381

Counsel for Respondents

April 14, 1997

APPENDIX

HOUSE BILL No. 2031

AN Act enacting the education and tax reform act of 1997; amending K.S.A. 72-6414, 79-4505 and 79-4508 and K.S.A. 1996 Supp. 72-6407, 72-6410, 72-6412, 72-6431, 72-6438, 72-6441, 72-6442, 79-32,110, 79-4502 and 79-5105 and repealing the existing sections; also repealing K.S.A. 79-4520 and K.S.A. 1996 Supp. 72-6412a, 72-6431a, 72-6442a, 72-8191 and 72-8192.

Be It Enacted By The Legislature Of The State Of Kansas:

* * * *

Sec. 13. On July 1, 1997, K.S.A. 1996 Supp. 79-32,110 shall be and is hereby amended to read as follows: 79,32,110. (a) RESIDENT INDIVIDUALS. Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married Individuals Filing Joint Returns.*

If the taxable income is:	The tax is:
Not over $30,000	3,5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All Other Individuals.*

(A) For tax year 1997:

If the taxable income is:	The tax is:
Not over $20,000	4.1% of Kansas taxable income

Over $20,000 but not over $30,000	$820 plus 7.5% of excess over $20,000
Over $30,000	$1,570 plus 7.75% of excess over $30,000

(B) For tax year 1998:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.75% of excess over $15,000
Over $30,000	$1,537.50 plus 7.75% of excess over $30,000

(C) For tax year 1999:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.25% of excess over $15,000
Over $30,000	$1,462.50 plus 7.45% of excess over $30,000

(D) For tax year 2000, and all tax years thereafter:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.25% of excess over $15,000

Over $30,000	$1,462.50 plus 6.45% of excess over $30,000

(b) NONRESIDENT INDIVIDUALS. A tax is hereby imposed upon the Kansas taxable income of every nonresident individual, which tax shall be an amount equal to the tax computed under subsection (a) as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income.

(c) CORPORATIONS. A tax is hereby imposed upon the Kansas taxable income of every corporation doing business within this state or deriving income from sources within this state. Such tax shall consist of a normal tax and a surtax and shall be computed as follows:

(1) The normal tax shall be in an amount equal to 4% of the Kansas taxable income of such corporation; and

(2) The surtax shall be in an amount equal to 3.35% of the Kansas taxable income of such corporation in excess of $50,000.

(d) FIDUCIARIES. A tax is hereby imposed upon the Kansas taxable income of estates and trusts at the rates provided in paragraph (2) of subsection (a) hereof.

* * * *

Sec. 20. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the HOUSE, and passed that body February 21, 1997

HOUSE concurred in
SENATE amendments March 21, 1997

/s/ Tim Shallenburger
Speaker of the House.

/s/ Janet E. Jones
Chief Clerk of the House.

Passed the SENATE
as amended March 20, 1997

/s/ Dick Bond
President of the Senate.

/s/ Pat Saville
Secretary of the Senate.

APPROVED April 4, 1997

/s/ Bill Graves
Governor.

Supreme Court, U.S.
FILED
APR 23 1997
CLERK

No. 96-1459

In The

Supreme Court of the United States

October Term, 1996

ERIC PEDEN and SHARON L. SMITH, for themselves and all others similarly situated,

Petitioners,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.
One Kansas City Place
1200 Main, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

ERIC C. PEDEN*
SCHLEICHER LATZ, P.C.
800 W. 47th Street, Suite 418
Kansas City, Missouri 64112
(816) 756-0800

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9 pp

TABLE OF CONTENTS

Page

I. Respondents Grossly Mislead This Court By Stating That The Dual-Rate Kansas Tax Structure Has Now Been "Repealed" And Is "Defunct." 2

II. Respondents Also Mislead This Court By Mischaracterizing The Unprecedented Dual-Rate Kansas Tax Structure As "Supposedly Unique." 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 5

Kellems v. Commissioner of Internal Revenue, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973) 4

Sowders v. Oklahoma Tax Comm'n, 552 P.2d 698 (Okla. 1976) 4

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondents' Brief in Opposition does not take issue with the fact that, starting in 1988, the State of Kansas instigated a systematic, discriminatory surtax against single people under the provisions of its state income tax code. Nor do Respondents disagree that the Kansas Supreme Court upheld this blanket discrimination on the sole basis of after-the-fact speculation that the Kansas legislature might have wanted to tax people into marriage. Instead, they oppose certiorari by trying to plant the misimpression that the unprecedented, dual-rate Kansas income tax structure is "repealed" and "defunct," and that the higher rates of tax systematically imposed on single persons are "indistinguishable" from the federal tax system. In fact, recent legislation passed by the State of Kansas does *not* eliminate the excess income tax rates imposed on single persons. The discrimination in rates continues. Also, Respondents conspicuously fail to cite one case, statute or example involving a structure like the present Kansas law or any other tax ever employed for the purpose of enticing marriage or penalizing singlehood. Respondents simply argue that there is "no constitutional difference" between the Kansas law and the federal tax code. It is precisely the difference under the unprecedented Kansas tax law – *that the State of Kansas is targeting a class of individuals and imposing higher rates of tax on their income for no other reason than they are not married* – that merits further review of this Court.

I. Respondents Grossly Mislead This Court By Stating That The Dual-Rate Kansas Tax Structure Has Now Been "Repealed" And Is "Defunct."

The dual-rate Kansas income tax structure at issue in this case has *not* been "repealed" and is *not* "defunct," as represented to this Court by Respondents.[1] In fact, even under the recent legislation passed by the State of Kansas and cited by Respondents, unmarried taxpayers will continue to be subject to higher, discriminatory income tax rates for not less than three more years. *See* Br. in Opp. App. 1a-4a. Only by the year 2000 are the tax rates charged to single persons *scheduled* to be equalized with the current married rates. Thus, contrary to Respondents' argument that the Kansas tax rate disparity is "not likely to recur" (Br. in Opp. 17), the unconstitutional taxation in Kansas has not even stopped – and it will continue to occur for at least three more years. Respondents also fail to mention that the new legislation provides no form of relief for the millions of dollars in unconstitutional taxes that have *already been* extracted from single persons since 1988, which refunds are also being sought by Petitioners in this case. *See* Pet. 8.

---

[1] In their Brief in Opposition, Respondents state that "the statute has recently been repealed by the Kansas legislature." Br. in Opp. 1. Respondents also state that "the income tax structure at issue has now been repealed by the Kansas legislature." *Id.* at 9. Finally, Respondents argue that this Court should not review "the constitutionality of a defunct provision of the Kansas income tax code." *Id.* at 17.

II. Respondents Also Mislead This Court By Mischaracterizing The Unprecedented Dual-Rate Kansas Tax Structure As "Supposedly Unique."

The discriminatory Kansas tax structure is, in fact, unique among the federal government and all other states. *See* Pet. 15 n.9. Even Respondent Department of Revenue has publicly recognized that:

> " . . . Kansas is the only state that applies different rates for single and married returns."

See Minutes of House Committee on Taxation (March 6, 1992) (testimony of Steve Stotts, Director of Research for the Department of Revenue) [Petitioners' Brief (Kansas Supreme Court) at A-30]. The Kansas Supreme Court recently acknowledged in *Peden* that "Kansas is the only state in the nation that has ever imposed higher tax rates on single taxpayers . . . " Pet. App. 15a. Yet, Respondents would have this Court believe that the Kansas tax rate structure is only "supposedly unique" and that it is "hyperbole" to point out that the Kansas tax structure is unprecedented and unique. *See* Br. in Opp. 8, 17. Respondents conspicuously fail to cite one case, statute or example involving a dual-rate tax structure like the present Kansas law or any other tax ever employed for the purpose of enticing marriage or penalizing singlehood. What Respondents really try to urge upon this Court is that there is "no constitutional difference" between the Kansas dual-rate tax structure and the federal tax law. *Id.* at 12. However, Respondents ignore the obvious "difference" that at no point has the federal law ever imposed higher tax rates on single persons, or ever otherwise systematically discriminated against singles in its tax

structure, as in Kansas. No other income tax law has ever been designed, utilized or explained as legislation to encourage marriage. *See* Pet. 24-26.

Respondents also choose to ignore the fact that income-splitting for married couples – which merely takes into account the fact that a married couple constitutes two taxpayers – is a fairness measure intended to ameliorate the effect of graduated income tax rates. Income-splitting has nothing to do with promoting the institution of marriage, much less penalizing singlehood.[2]

---

[2] Respondents cite two lower court decisions dealing with income-splitting as support for the Kansas Supreme Court's decision in *Peden*. *See* Br. in Opp. 16, *citing Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973), and *Sowders v. Oklahoma Tax Comm'n*, 552 P.2d 698 (Okla. 1976). However, Respondents fail to point out that both *Kellems* and *Sowders* dealt only with the question of income-splitting by married couples – *not* different rates of tax as in Kansas. Unlike the unique Kansas structure, income-splitting has nothing to do with the enticement of people into marriage nor does it create a systematic, discriminatory rate surtax on single people. *See* Pet. 24-26. *Importantly,* neither *Kellems* nor *Sowders* discussed the enticement of marriage as a possible justification for income-splitting.

CONCLUSION

Respondents erroneously argue that: "Petitioners' real complaint is not that the [*Peden*] decision conflicts with *Beach Communications* but rather that *Beach Communications* was, in their view, wrongly decided." Br. in Opp. 15, *citing FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). On the contrary, Petitioners do not disagree with the holding in *FCC v. Beach*. What occurred in *Peden* is that the Kansas Supreme Court misapplied *FCC v. Beach* to indulge a blundering legislature – transforming what was labeled as "fanciful" by the district court into "rational speculation" that now serves as the linchpin for the entire Kansas tax rate structure. The Kansas Supreme Court: (i) ignored the obvious, admitted reason for higher singles' rates (i.e., the legislature targeted a minority group for the purpose of raising revenue), (ii) used "rational speculation" to find a purpose to fit the facts (i.e., it is "rational" to speculate both that Kansas might have wanted to entice marriage through discriminatory tax rates and that the state income tax rates might rationally cause Kansas taxpayers to marry), and (iii) by its very "rational speculation" and its unprecedented conclusion that it is permissible to tax people into marriage, implicated and ignored the fundamental rights of persons in their personal decisions on marriage.

The present case involves systematic discrimination against single persons who live or work in Kansas based on a holding that it is permissible to tax people into marriage. It does not involve the mere regulation of cable television as in *FCC v. Beach*. The *Peden* decision is anything but an "unexceptional application of settled law"

(Br. in Opp. 8) as Respondents try to maintain. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.

ERIC C. PEDEN*
SCHLEICHER LATZ, P.C.

Counsel for Petitioners

**Counsel of Record*
April 23, 1997